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*Nov. 17, 1902.*





**THE  
CONFIRMATION OF EXECUTORS  
IN SCOTLAND**



*Printed by* **LORIMER AND CHALMERS, Edinburgh**  
**FOR**  
**WILLIAM GREEN & SONS**  
*January, 1902*

67

THE  
CONFIRMATION OF EXECUTORS  
IN  
SCOTLAND

*ACCORDING TO THE PRACTICE IN THE  
COMMISSARIOT OF EDINBURGH*

WITH  
APPENDICES OF ACTS AND FORMS

By JAMES G. CURRIE  
DEPUTE COMMISSARY CLERK OF EDINBURGH

THIRD EDITION

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## PREFACE TO THE FIRST EDITION.

THE purpose of this book is to afford practical guidance in the preparation of Inventories and in expediting Confirmation. The only work dealing specially with the subject is the Treatise of Mr. Alexander on *The Practice of the Commissary Courts in Scotland*, published in 1859. Since that date there have been important statutory changes affecting the contents of the inventory, the execution of wills, the forms of process, and the payment of inventory duty; several questions under the Intestate Moveable Succession Act which were then in doubt have been settled by the Supreme Court; and on many points, especially those relating to foreign domicile and foreign law, the rules of procedure have become more clearly determined. It is believed, therefore, that a statement of the present practice may not be unacceptable.

During the last twenty-five years notes have been taken by the Author of the procedure in all cases in the Commissariat of Edinburgh involving any speciality, and of the decisions and instructions given by the Commissaries and Sheriffs in regard thereto. The cases quoted within brackets in the text are selected from these notes, and from the earlier records of the Court, and are not otherwise reported.

The Author feels bound gratefully to acknowledge the aid he has received in preparing this work from Mr. John Smith and Mr. George Adam, senior assistants in the Commissary Office, Edinburgh.

EDINBURGH, 2nd April 1884.

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## PREFACE TO THE SECOND EDITION.

IN this Edition many portions of the work have been re-written and re-arranged, a considerable amount of new matter has been introduced, the forms have been revised in accordance with the most recent practice, and there has been added an Appendix of the principal Statutes, sections of Statutes, and Acts of Sederunt referred to in the text.

EDINBURGH, 23rd July 1890.

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## PREFACE TO THE THIRD EDITION.

SINCE the Second Edition of this work was published in 1890, several Statutes have been passed materially affecting the practice in Commissary causes. The Colonial Probates Act, 1892, the Finance Act, 1894 (with its amending Acts), and the Executors (Scotland) Act, 1900, have necessitated extensive alterations and additions in dealing with Inventories of Personal Estate, the transmission of Trust and Executory Funds, Confirmations as executor-nominate, and Colonial Grants as a title to property in this country and *vice versa*. The whole work has been carefully revised, and a list of Reported Cases cited has been added.

EDINBURGH, 31st December 1901

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ON THE

# CONFIRMATION OF EXECUTORS

IN THE

## COMMISSARIOT OF EDINBURGH.

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### CHAPTER I.

#### JURISDICTION IN COMMISSARY CAUSES.

**CONFIRMATION** is the ratification by a competent Court of an appointment of executors, made either by the deceased himself or by the Court, and constitutes a title to uplift, receive, administer, and dispose of the personal estate of the deceased person contained in an inventory given up by the executors, and upon which the confirmation proceeds.

CHAP. I.  
Confirmation defined.

It is proposed in this chapter to give some account of the Commissary Courts by which, formerly, confirmations were granted in Scotland, of the abolition of these Courts, and of the judicial arrangements which, as regards this portion of their jurisdiction, have now been substituted. Commissary Courts<sup>1</sup> were established by royal authority, after the Reformation, in room of the ancient Ecclesiastical Courts, to whose powers and privileges they succeeded. Their name was derived from that

By what Courts granted.

<sup>1</sup> Erskine, 1. 5; *Third and Fourth Reports by Commissioners on Courts of Justice in Scotland*, 1818; *Fraser's Judicial Proceedings* (1814); M'Gla-

shan's *Sheriff Court Practice*, 1, 1, 5; *Alexander's Practice of the Commissary Courts*, chap. i.

CHAP. I. of the persons to whom the bishops had been wont to delegate or *commit* their judicial functions, and who were called the bishops' *commissaries*.

Principal Commissary Court. The Principal Commissary Court was established at Edinburgh by Queen Mary, under Royal Warrant dated 8th February 1563. It consisted of four judges, and was supreme in respect of the other Commissary Courts, though its own decrees were subject to review by the Court of Session. The latter Court, however, did not pronounce sentence, but remitted to the Commissaries, with instructions. The Commissary Court of Edinburgh exercised a two-fold jurisdiction—one local, and the other general. Its local jurisdiction was coterminous with that of the former bishopric of Edinburgh, and comprehended the counties of Edinburgh, Haddington, Linlithgow, Peebles, and part of Stirlingshire. Its general jurisdiction extended over the whole of Scotland and the islands thereto belonging. In causes which were strictly of a consistorial nature—such as those relating to the constitution or dissolution of marriage, divorce, separation, and legitimacy, and in the confirmation of all persons dying domiciled abroad, or without any fixed domicile, having personal estate in Scotland—the jurisdiction of the Commissaries of Edinburgh excluded not only that of all the other civil courts, in the first instance, but also that of all the Inferior Commissaries. As the local judges in their own Commissariat, they exercised a privative jurisdiction in the confirmation of testaments, in competitions for the office of executor, and in the registration of inventories and settlements; and also a concurrent jurisdiction with other judges ordinary in actions of scandal or verbal injury, and actions of aliment against husbands; in applications for sealing the repositories of deceased persons; in actions by creditors or legatees against executors; in authenticating tutorial and curatorial inventories; and in actions for recovery of debts to the amount of £40 Scots (£3, 6s. 8d. sterling), or to any amount if the debtor consented,

which he was held to do if he appeared and lodged defences. CHAP. I.  
 The Commissaries of Edinburgh had also a power of review over, and could reduce or alter, the decrees of the Inferior Commissaries in all matters that fell within the jurisdiction of the latter, if challenged within a year from the date of the decree. This power, however, they were very seldom called upon to exercise, parties who felt aggrieved by the judgments of the Inferior Commissaries preferring a direct appeal to the Court of Session, which was also, in most if not in all cases, competent.

The Inferior Commissaries were originally fourteen in number, being one for each of the Scottish dioceses; but their number was augmented from time to time until it reached twenty-three. The Inferior Commissariots were ultimately those of Aberdeen, Argyll, Brechin, Caithness, Sutherland, Dumfries, Dunblane, St. Andrews, Dunkeld, Glasgow, Hamilton and Campsie, the Isles, Inverness, Kirkcudbright, Stirling, Lauder, Lanark, Moray, Orkney, Shetland, Peebles, Ross, Wigtown. These Commissariots differed greatly in the extent of territory which they embraced, and their boundaries were entirely different from those of the counties, a Commissariot being often scattered in small patches over several counties. Thus the Commissariot of Glasgow comprehended but a small portion of Lanarkshire (the greater part of that county belonging to the two Commissariots of Lanark and Hamilton), while, on the other hand, it extended into the counties of Renfrew, Ayr, Dumbarton, and Stirling. In like manner, the Commissariot of St. Andrews comprehended fifty-two parishes in Fife, four in Kinross, one in Linlithgow, three in Clackmannan, twelve in Perth, forty in Forfar, and fourteen in Kincardine.<sup>1</sup> The jurisdiction exercised by the Inferior Commissaries was in all cases the same in its quality and amount. It included

<sup>1</sup> An alphabetical table of all the parishes in Scotland, with the name of the Commissariot to which each of them belonged, will be found in Keith's *Catalogue of Scottish Bishops* (1755).

## CHAP. I

some of the less important consistorial actions, and was in other respects commensurate with that exercised by the Commissaries of Edinburgh, as the local judges of their own Commissariat. But their chief duty consisted in receiving and recording inventories and settlements, and granting confirmations in the cases of persons who died domiciled within their Commissariots, confirmation in such cases being competent only in the local Court, except in case of a vacancy in the office of Commissary.

Courts  
reconsti-  
tuted.

By the Act 4 Geo. iv. c. 97 (1823), the Commissary Courts were subjected to extensive changes, resulting in their entire reconstruction, with greatly diminished powers. All the Inferior Commissariots were swept away; the Commissariat of Edinburgh was restricted to the three Lothians; and each of the other counties in Scotland was erected into a Commissariat, with the Sheriff as Commissary, and with a Commissary Clerk, whose office was distinct from that of the Sheriff Clerk. The appellate jurisdiction of the Commissaries of Edinburgh was abolished, and the sole right of revision vested in the Court of Session.

By the Act 1 Will. iv. c. 69 (1830), the counties of Haddington and Linlithgow were detached from Edinburgh, and erected into separate Commissariots on the same footing as the other counties; and by the Act 6 and 7 Will. iv. c. 41 (1836), the old Commissary Court of Edinburgh itself was abolished, and its whole remaining powers and jurisdictions transferred to the Sheriff of the county of Edinburgh, as the Commissary thereof.

Powers  
restricted.

By these various Statutes, and by the Act 13 and 14 Vict. c. 36 (1850), the extensive jurisdiction of the Commissary Courts was gradually restricted to the confirmation of executors, and matters incidental thereto—viz., questions as to the formal execution of wills containing a nomination of executors, and the meaning and effect of such nominations; the appointment of executors-dative, and fixing the caution to be found by them;

the appointment of factors for minor and pupil executors *quoad* CHAP. I.  
 executry funds; the registration of inventories and settlements;  
 competitions for the office of executor and for confirmation;  
 and granting warrant to examine and seal repositories, and  
 secure the estate of a deceased until an executor is confirmed.  
 Applications for the examination of parties supposed to have  
 secreted the effects of the deceased,<sup>1</sup> and actions for the exonera-  
 tion of executors and their cautioners, were also apparently  
 still competent, but have now fallen into almost entire disuse;  
 and actions for scandal, with a conclusion for palinode, or  
 judicial recantation, remained competent only in the Commis-  
 sary Courts,<sup>2</sup> but are now completely obsolete.

Finally, by the Sheriff Courts (Scotland) Act 1876,<sup>3</sup> Commis-  
sary Courts  
abolished.  
 § 35, the Commissary Courts in Scotland were completely  
 abolished, and their whole powers and jurisdictions in each  
 Commissariat transferred to the Sheriffs then holding the  
 office of Commissaries, and to their successors in office, as  
 Sheriffs, who should thereafter possess and exercise the whole  
 of the said powers and jurisdictions—it being provided that it  
 should still be competent and proper to affix the “Seal of  
 office of a Commissariat” to all documents to which it would  
 have been competent and proper to affix the same before the  
 commencement of the Act. The Seal of office and the term  
 “Commissariat” continued on it still remain therefore as  
 distinctive traces of the old Courts. And the use of the term  
 is convenient, in contradistinction to Sheriffdom and County,  
 with neither of which it is in all cases synonymous, and to dis-  
 tinguish, especially as regards records, what belongs to the  
 Sheriff Courts proper, and what has been transferred to them  
 from the Commissary Courts.<sup>4</sup>

By § 54 of the Statute, powers were granted to the Court Commis-  
sariots and  
offices.  
 of Session to regulate procedure and the fees of Court, and

<sup>1</sup> Henderson v. Reid, 9th June  
 1832, 10 S. 432.

<sup>3</sup> 39 and Vict. c. 70, Appendix  
 xiv.

<sup>2</sup> Turner v. Cuthbert, 21st June  
 1831, 9 S. 774.

<sup>4</sup> See Chapter XI., “Records.”

CHAP. I. also the place or places at which the business transferred to the Sheriff Courts should be conducted, and where the Records should thereafter be kept. At the passing of the Act in 1876, as a rule, each county formed a Commissariat, with an office in the county town, in which the whole work of the Commissariat was performed. But there were several exceptions. Orkney and Shetland each formed a Commissariat, with offices at Kirkwall and Lerwick respectively; Ross and Cromarty together formed a Commissariat, with one office at Tain; and Elgin and Nairn also formed one Commissariat, but with two offices, one at Elgin and the other at Nairn. In Lanarkshire the office was not at Lanark (the county town), but in Glasgow; and in Renfrewshire, not at Renfrew, but at Paisley. In Perthshire, there was an office at Dunblane, as well as at Perth; and in Forfarshire at Dundee as well as at Forfar.<sup>1</sup> By Act of Sederunt, dated 15th January 1890,<sup>2</sup> it is ordained that Commissary business transferred to the Sheriff Courts shall continue to be conducted at the same places in each Commissariat as at the passing of the Sheriff Court Act, and also (giving effect to certain changes introduced in Renfrewshire in 1885, and in Lanarkshire in 1888) at the following places—viz.: In the Commissariat of Renfrew at Greenock, in addition to Paisley; and in the Commissariat of Lanark, at Lanark, Airdrie, and Hamilton, in addition to Glasgow; and that it shall not be competent to record Inventories or expedite Confirmations except at these places. It is also provided that Petitions in Commissary causes may in certain cases be presented in any Court within the Commissariat in which ordinary Sheriff Court business is done. Rules are also laid down in regard to Caveats and the custody of the records.

Clerks of  
Courts.

Under the provisions of §§ 36, 37, and 38 of the Statute of 1876, the office of Commissary Clerk, with its whole powers and duties, is already in most counties merged in that of the

<sup>1</sup> 20 Geo. II. c. 43; 4 Geo. IV. c. 33 and 34 Vict. c. 86, § 13.  
97, § 6; 1 and 2 Vict. c. 119, § 26;      <sup>2</sup> Appendix xv.

Sheriff Clerk, and will ultimately be so in all except Edinburgh, where the office will continue to be maintained distinct from that of the Sheriff Clerk, and to be regulated by the Act 4 Geo. IV. c. 97, § 5. Where the office of Commissary Clerk continues to subsist, he is authorised to perform in the Sheriff Court of the county all the duties and exercise all the powers formerly performed and exercised by him in the Commissary Court, and all Commissary business must be conducted through his office, and not through that of the Sheriff Clerk. A Sheriff Clerk or his depute cannot act as an agent either directly or indirectly in the Court of which he is clerk;<sup>1</sup> but the Statute provides that a Commissary Clerk shall not, by acting as clerk in a Sheriff Court, be disabled from acting as a procurator therein except in Commissary causes. It is also incompetent for a Clerk of Court to act as clerk either personally or by his depute in any cause to which he is a party.<sup>2</sup> The proper course in these circumstances is to apply to the Court to appoint a Clerk to act *pro hac vice*.<sup>3</sup> Where the Commissary Clerk is an applicant for confirmation, the practice is to apply by petition to the Sheriff for a warrant in favour of the depute to act in the cause and sign the confirmation as Clerk.

The agents entitled to practise in Commissary causes, where any application to the Court by petition is necessary, are the law-agents enrolled in the Sheriff Court of the county: but there is no restriction as to the persons who are entitled personally to give up an inventory and expedite confirmation on behalf of the executor. The practice in regard to conducting business by correspondence is regulated by the Act of Sederunt of 15th January 1890,<sup>4</sup> which provides that an executor, or any duly qualified law-agent in Scotland acting on behalf of such executor, may send an inventory

Practitioners.

<sup>1</sup> Act of Sederunt, 10th July 1839, § 160; *Smith and Tasker v. Robertson*, 27th June 1827, 5 S. 848.

<sup>2</sup> *Manson v. Smith*, 8th February

1871, 9 M. 492.

<sup>3</sup> *Macbeth v. Innes*, 8th February 1873, 11 M. 404.

<sup>4</sup> Appendix xv.

**CHAP. I.** with the relative writs, to any Commissary or Sheriff Clerk, for registration in the books of his Court, and the Clerk shall receive and record the same as having been presented by the sender, and transmit the confirmation and relative writs to the presenter by post, if required, on payment of the usual fees, it being provided that nothing contained in the Act shall affect the procedure with reference to petitions in executry causes. The effect of this proviso is that petitions can be received only when signed and presented personally, either by the parties or by a practitioner in the local Court.

## CHAPTER II.

### DOMICILE.

THE necessity for considering this subject at the outset will be obvious when it is observed that the domicile of a deceased person determines not only the Court in which an inventory must be recorded, and the application for confirmation made, but also the persons in whose favour confirmation may be granted. It also regulates what estate may be included in an inventory, and the incidence of Government duties. It is proposed first to endeavour to show what constitutes domicile and how it may be ascertained, and then to point out its consequences as affecting the administration of personal estate.

CHAP. II

#### WHAT CONSTITUTES DOMICILE.

Domicile has not been found capable of any strict definition.<sup>1</sup> It expresses a relation between a person and a place, according to which the former is held to have a fixed residence at the latter. It is not coincident with actual residence, for a person may not be residing, and may never have resided, at the place where his domicile is. Nor is it coincident with nationality or political allegiance, for a person may be the subject of one State while he is domiciled within the territory of another. The general idea is that it is the home which a man derives from his parents or chooses for himself. In the former case it is called his original domicile or domicile of origin, and in the latter an acquired domicile.

Meaning of  
Domicile.

<sup>1</sup> On this branch of the subject see 14th May 1868, 6 M. 69; *Udny v. especially Bell v. Kennedy*, H.L., *Udny*, H.L., 3rd June 1869, 7 M. 89.

## CHAP. II.

Domicile  
of Origin.

The domicile of origin is not necessarily the place of birth. It is the domicile of the father at the time, or, in illegitimacy, the domicile of the mother. The domicile of origin is retained until a new domicile is acquired. It is not lost by mere abandonment; a person may have left his domicile of origin *non animo revertendi*; but until he has actually fixed his residence elsewhere the domicile of origin adheres. Practically, therefore, there is no person without a domicile, and no person can have more than one domicile at the same time. On the abandonment of an acquired domicile the domicile of origin revives and reverts, until a new one has been acquired or a former one resumed. The domicile of origin holds whether the person dies *in itinere* from or to it, and it has been held that the domicile which thus adheres and reverts, is the domicile of birth, and not any other domicile the father may acquire before the child becomes *sui juris*.<sup>1</sup>

Acquired  
Domicile.

A new domicile is acquired by residence *animo manendi*. The duration of the residence is not an element of much importance if the *animus* be clear; but there must be actual residence, however brief. If the person dies *in itinere*, the intended domicile will not attach, as it would do if the journey were from an acquired domicile to the domicile of origin. A sufficient *animus manendi* need not be a definite intention to remain at the place always. It is rather an intention to remain there for an indefinite period. And the intention can be proved only by reference to the whole circumstances in each particular case. For while there is no fact in a man's history or surroundings which may not form an element in the proof, there is hardly any one circumstance which can be considered of itself conclusive. Declarations by the person himself are important; but even they have been discarded when they were inconsistent with his acts. General indications of intention are held to be more trustworthy than special state-

<sup>1</sup> *Craignish v. Hewit*, 3 Ch. 180 (1892).

ments. A man cannot fix his domicile by a mere resolution. Though a deceased in his will may have described himself as domiciled in one country, it has frequently been held on his death that he was domiciled in another (Smith, 9th March 1870 ; Adie, 14th March 1881 ; Cunningham, 17th Nov. 1885).

During pupillarity a child follows the domicile of his father ; and on the father's death the domicile of the mother, unless she changes the domicile with the express purpose of altering the child's succession. It would appear that by the law of Scotland a minor may choose his domicile on attaining the age of puberty. "A minor can make a will disposing of his personal succession, and, of course, can do so by change of domicile."<sup>1</sup> A minor may be forisfamiliarized, and marry, and change his actual home, and it is reasonable to hold that he may also change his legal home or domicile.<sup>2</sup>

A married woman acquires the domicile of her husband and follows it during the subsistence of the marriage whether she resides with him or not ;<sup>3</sup> if judicially separated she may be free to choose her own domicile<sup>4</sup> (Stewart, 20th July 1888), but the question has been considered open.<sup>5</sup>

A lunatic does not acquire a domicile in any place where he may be residing under restraint, and consequently retains that which he had previous to his confinement. In regard to the domicile of a deceased lunatic, it has been considered "not clear that the period of the lunacy is totally to be discarded."<sup>6</sup> Probably mental incapacity which would invalidate the execution of a will would also prevent the acquirement of a domicile.

<sup>1</sup> Robertson on *Personal Succession*, 202.

<sup>2</sup> Arnot v. Groom, 24th Nov. 1846, 9 D. 142.

<sup>3</sup> Wyllie v. Laye, 11th July 1834, 12 S. 927.

<sup>4</sup> Fraser on *Husband and Wife*, 254.

<sup>5</sup> Dicey on *Domicil*, 105, but see *Low v. Low*, 19th Nov. 1891, 19 R. 124, per Lord Trayner.

<sup>6</sup> Robertson on *Personal Succession*, 163.

CHAP. II. A domestic servant is in general domiciled in the place of residence as a servant. But there is nothing in the nature of domestic service to necessitate the acquisition of a domicile, and the domicile of origin will not be held as lost without some evidence of an intention to abandon it. If a male domestic is married, the home in which his wife and family reside will be his domicile wherever he may be engaged in service.

A student does not acquire a domicile at a university by residence there for the purpose of his education, but he may do so if he has no other home (Traill, 24th August 1859).

Mariners, actors, or others, whose profession or inclination leads them to spend a wandering and unsettled life, and who have no fixed residence elsewhere to which they always return, retain their domicile of origin.<sup>1</sup>

An exile or political refugee does not lose his domicile in the country from which he is expatriated, so long as his absence from it is due to compulsion and not to choice.

A man does not acquire a domicile so as to affect his succession by living in a savage or barbarous country not belonging to the community of civilised States (Howison, 7th May 1875).

Public  
Service.

Ambassadors and Consuls do not, by accepting such appointments, acquire a domicile in the country to which they may be accredited; but if they are already domiciled there, they do not, in virtue of their appointment, acquire a domicile in the country they represent.<sup>2</sup> Governors of colonies and other public officers, whose tenure of office is in its nature permanent, acquire a domicile where they are stationed.<sup>3</sup> An ecclesiastic is domiciled in his benefice; but a parish minister, who has given up the active duties of his parish, will not be prevented

<sup>1</sup> Aikman v. Aikman, 12th March 1861, 3 Macq. 854.

<sup>2</sup> Dicey on *Domicil*, 138.

<sup>3</sup> Clarke v. Newmarch, 13th Feb. 1836, 14 S. 488; Commissioners of

Inland Revenue v. Gordon's Executors, 2nd Feb. 1850, 12 D. 657, but see Fairbairn v. Neville, 30th Nov. 1897, 25 R. 192.

from acquiring a domicile elsewhere by continuing to hold the appointment. CHAP. II.

Any person entering the military or naval service of a foreign country acquires a domicile in that country, but any British subject who joins the army or navy of Great Britain, wherever he may be stationed or called on to serve, retains the domicile he had when he entered the service;<sup>1</sup> and this rule applies to an acquired domicile as well as to the domicile of origin.<sup>2</sup> The following case occurred in the Commissary Court of Edinburgh: Neither the deceased nor his father ever had any residence in Scotland; his grandfather had been born at Dalkeith in 1758, and while a young man joined the army; his father was born in Antigua while the grandfather was stationed there, and he, too, joined the army in early life; the deceased was born while his father was in the service, and he also had joined it and died in it; his domicile was held to be domicile of origin of his grandfather (Peddie 6th December 1860). Military Service.

A person in the Indian civil or military service was held to have acquired a domicile in India. Doubt is now entertained on this point on two grounds: (1) the Act of the British Parliament 21 and 22 Vict. c. 106, 1858, transferring the Government of India from the East India Company to the Crown; and (2) the Succession Act of 1865, passed by the Indian Council, which "explains" that "a man is not to be considered as having taken up a fixed habitation in British India merely by reason of his residing there in Her Majesty's civil or military service, or in the exercise of any profession or calling." The effect of these Acts has been discussed by the Supreme Court, but the only question decided was that they cannot affect a domicile which had been acquired before either of them was passed.<sup>3</sup> It is understood Indian Service.

<sup>1</sup> Robertson on *Personal Succession*, 174; Phillimore on *Domicil*, 79.

Ch. Div. 30. 165.

<sup>2</sup> Macreight, 25th June 1885, L. R.

<sup>3</sup> Wauchope v. Wauchope, 23rd June 1877, 4 R. 945.

CHAP. II. that the Board of Inland Revenue contend that no person now by entering the Indian service thereby acquires an Indian domicile, but it does not appear that this question has yet been determined by any Court in this country. The obligation on persons in the Indian service of residence in India for an indefinite period is the same now as formerly, and the case of persons in the Indian service still differs materially from that of soldiers in a strictly British regiment stationed in India for a limited time.<sup>1</sup>

Two residences.

When a man has two residences, one in the country and the other in the metropolis, the presumption is held to be that, if he be a nobleman or landed proprietor, his domicile is in the country ; but that, if he be a merchant or in the practice of any trade or profession, his domicile is in the metropolis.<sup>2</sup>

Settler or Visitor.

But it is in cases that cannot be classed under any special head that difficulty in determining the domicile most frequently arises. These cases may be said to range between that of the settler on the one hand, and the visitor on the other, about neither of which can there be any doubt. When an emigrant leaves his native country to settle in some foreign land and make it his home, and dies at any time after reaching his destination, he has clearly become domiciled in the land of his adoption. A vague hope or desire to return, which may be nothing more than an impulse of patriotism or domestic affection, will not, in these circumstances, prevent the acquisition of a new domicile. On the other hand, where a person leaves his home and goes abroad only for a special purpose or a limited time,—to construct a railway or harbour or canal, to erect a gas work or introduce some new machinery or apparatus, to wind up a mercantile business, to fulfil a

<sup>1</sup> *Steel v. Steel*, 13th July 1888, per Lord President, 15 R. 909 ; *Alexander's Practice*, 38 ; but see Savigny (Guthrie's translation), 59,

note D ; and Dicey on *Domicil*, 141, note.

<sup>2</sup> *Alexander's Practice*, 28.

temporary appointment, to prosecute some scientific inquiry, CHAP. II.  
 to spend the winter in a milder climate, or simply to indulge  
 in the recreation of foreign travel;—if such a person dies  
 abroad, it is equally clear that unless there has been some  
 change of purpose, no alteration on the domicile will  
 have been effected. Between these two, however, there is a  
 wide gradation of cases. Many persons leave Scotland,  
 and go to reside in some other portion of the British  
 dominions, or in a foreign country, for purposes of business,  
 of health, or of pleasure, without any definite intention,  
 which is not conditional on success in business being  
 achieved, or health being restored, or on some other con-  
 tingency which may or may not occur, and die after a  
 more or less prolonged residence in the country to which  
 they have gone. In such cases the question whether  
 any former domicile has been abandoned and a new domi-  
 cile acquired can only be determined by considering whether  
 the circumstances approach more nearly in character  
 to those of the visitor or the settler, and by reference to  
 the numerous decisions and dicta quoted and commented  
 on by the learned authors who have written on the sub-  
 ject.<sup>1</sup>

There is always a certain presumption that the place where  
 a person actually resides is the place where he wishes and  
 intends to reside; and though mere length of residence in any  
 place will not fix a domicile there, the longer the residence is  
 the stronger will be the presumption of permanency. But the  
 strongest presumption on this subject is that where the domicile  
 of origin is known, it must be held as retained until the con-  
 trary is proved. “Every man’s domicile of origin must be  
 presumed to continue until he has acquired another sole  
 domicile by actual residence with the intention of abandoning  
 the domicile of origin. The change must be *animo et facto*,

<sup>1</sup> See the works of Robertson, Story, Fraser, Bar, Savigny, Phillimore, and Dicey, referred to in this chapter.

CHAP. II. and the burden of proof unquestionably lies upon the party who asserts the change."<sup>1</sup>

**Persistency of Domicile of Origin.** The more recent decisions bring out very strongly the persistency with which the domicile of origin adheres, and the necessity for proving its abandonment before any new domicile can be set up.

**Lawson.** In a special case submitted to the Second Division, where the deceased was a Norwegian who had lived in Scotland for twenty years, some time as a clerk in Greenock, thereafter as a spirit-dealer in Port-Glasgow, where he had married and purchased a house, the Court refused to determine from the facts stated whether the deceased had abandoned his domicile of origin—that being an inference not of law but of fact, upon which the parties must be agreed—and only decided that the deceased died domiciled in Scotland after it had been stated as a fact in the case that the deceased had no intention of returning to his native country.<sup>2</sup>

**Patience.** A Scotchman, after being forty years in the army, retired and spent the last twenty years of his life in England. He never visited Scotland while in the army or afterwards. He had no fixed residence in England, but lived in hotels and in lodgings in London, and at various watering-places. There was no evidence of any expressed intention to make England his home. It was found by the Court of Chancery in England that the domicile of origin had not been abandoned.<sup>3</sup>

**Steel.** Another Scotchman became a merchant in Rangoon, and for fifteen years resided chiefly there, paying occasional visits to Scotland. He then formed a branch of his business in London, and for the next fourteen years, during which he married, lived in London. He thereafter returned to reside in Scotland, and it was held that as he had never manifested any

<sup>1</sup> *Aikman v. Aikman*, 12th March 1861, 3 Macq. 854, *per* Lord Wensleydale; *Vincent v. Earl of Buchan*, 19th March 1889, 16 R. 637.

<sup>2</sup> *Lawson's Trustees v. Lawson*, 20th July 1883, 10 R. 1278.

<sup>3</sup> *Patience v. Main*, 19th Mar. 1885, 29 L. R. Ch. Div. 976.

intention of abandoning his domicile of origin, it had never been lost.<sup>1</sup> CHAP. II.

In a subsequent case the deceased, who had been born in Glasgow, passed at the Scottish bar, and thereafter removed to London, where he was alleged to have resided continuously for nearly fifty years. Confirmation was applied for in Lanarkshire, which was his domicile of origin, and where he continued to hold considerable heritable property. Objections to the confirmation being granted, were lodged on the allegation *inter alia* that the deceased was domiciled in England. In affirming the judgment of the Sheriff that no ground had been set forth for refusing confirmation, it was observed—"The allegation that one would look for in these circumstances is not a mere assertion that there was an English domicile at the date of death. There should be a further allegation that there was a change of domicile, and a statement as to how and when that change took place. As we have had occasion to remark lately, a change of domicile is not very easily brought about, and there must be a clear indication of intention to change his domicile by the gentleman whose domicile of origin is said to be lost"<sup>2</sup>

The daughter of a Scotch earl and wife of a Scotch landed proprietor, on the death of her husband, left Scotland and went to London, where she continued to reside until her death five years afterwards. She had expressed her intention not to return to live in Scotland, and to have no permanent home anywhere else. It was held that not having *animo et facto* acquired a new domicile, her domicile of origin had not been abandoned.<sup>3</sup> *Lady Lee Harvey.*

<sup>1</sup> *Steel v. Steel*, 13th July 1888, 15 R. 896; see also *Jopp v. Wood*, 34 L. J. Ch. Div. 212.

<sup>2</sup> *Hamilton v. Hardie*, 7th Dec. 1888, 16 R. 192, *per* Lord President; see also *Urquhart v. Butterworth*, 9th Dec. 1887, 37 L. R. Ch. D. 357.

<sup>3</sup> *Vincent v. Earl of Buchan*, 19th

March 1889, 16 R. 637. See *Low v. Low*, 19th Nov. 1891, 19 R. 115; *Hood v. Hood*, 24th June 1897, 24 R. 973; and *Ross v. Ross*, 21st June 1899, 1 F. 963; *Brooks*, 25th June 1901 (Outer House); but see also *Winans*, 29th Nov. 1900, 17 *Times' Law Reports*, 94.

## WHAT DOMICILE DETERMINES.

## CHAP. II.

*Lex domi-*  
*cilii and*  
*Lex rei*  
*sitæ.*

Where the deceased has died domiciled in Scotland, the right to confirmation is regulated by the law of Scotland, but where he has died domiciled furth of Scotland, the right to confirmation will be regulated by the law of the particular country in which he has died domiciled. This is in accordance with the principle of international law, that moveable or personal property follows the person, so that the parties entitled to its administration and to share in its distribution on the owner's death are determined, not by the law of the place where it is situated, but by the law to which the owner was subject as regards his personal or family relations, and which law is that of the place where he had his domicile or legal home. But although the persons having right to administer are determined by the law of the deceased's domicile, their title to administer must be granted by the Courts and in accordance with the judicial forms of the country in which the estate is situated, and the debtors reside. No title can have any effect in regard to estate not situated within the jurisdiction of the Court which grants it. Where a title to administer has been granted by a competent Court in the country of the deceased's domicile its effect as an active title to collect, uplift, and grant discharges for the estate will be limited to that country. If there is any estate elsewhere, what has been called an ancillary title must be obtained in the Courts of the country where the estate is. But it is not necessary that the person entitled to administer should in the first place obtain a title or have his right recognised in the Courts of the deceased's domicile. There may be no estate there in respect of which any administrative title is necessary. It is a very common thing for persons having an interest in a Scotch succession, which can only be discharged by a Scotch title, to die domiciled abroad without any other estate, and in whose case therefore administration in Scot-

land is the only administration required. And there are some countries in which there is no judicial process at all analogous to Confirmation or to the granting of Probate or Letters of Administration, and where the beneficiaries appear to obtain possession of the personal estate by a direct title, like the heir in heritage in this country, without the intervention of any one whose function is merely administrative. But if the estate is in Scotland, it can only be recovered by an executor duly confirmed in a Scotch Court, and in every case the confirmation as executor is granted to the persons whom the Courts of the deceased's domicile either have appointed, or would recognise as entitled, to realise estate within their own jurisdiction.<sup>1</sup> "The succession to moveable estate is regulated exclusively by the law of the domicile, without any reference to the place where any portion of the moveable estate may be actually situate. The practice is to allow foreign executors to come here and obtain confirmation so as to give them a title to that portion of the moveable estate of a foreign defunct which happens to be situated in this country, and that whether the executor be an executor-nominate or an executor at law."<sup>2</sup>

In regard to Testate Succession where the testator has died domiciled furth of Scotland, the first question is as to the validity of the Will. The general rule is that the validity of all wills falls to be determined by the law of the country within whose jurisdiction the testator may have died domiciled. But this rule has been largely modified, at least as regards the administration of estate within the United Kingdom, in the case of British subjects, by the Wills Act dated 6th August 1861. It had already been decided that by the law of Scotland a will made in conformity with the law of the place where it

CHAP. II.  
Lex domi-  
ciliis and  
Lex rei  
sita.

Foreign  
Testate  
succession.

<sup>1</sup> Story's *Conflict of Laws*, chaps. 12 and 13; Bar's *International Law* (Gillespie's translation), 461; and *Opinions of the Judges in Orr Ewing's Trustees v. Orr Ewing*, 29th

Feb. 1884, 11 R. 600, and H.L., 24th July 1885, 13 R. 1.

<sup>2</sup> *Goetze v. Avers*, per Lord President, 27th Nov. 1874, 2 R. 153.

CHAP. II.  
Wills Act  
1861.

was made was validly executed.<sup>1</sup> By the Wills Act it is provided that the wills of all British subjects who may die after the passing of the Act, wherever they may be domiciled at the time the will is made, or at the date of death, shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to Probate, and in Scotland to Confirmation, if made according to the law of the place where they are made; and also, if made without the United Kingdom, according to the laws either of the deceased's domicile at the time, or of that part of the United Kingdom where he had his domicile of origin: that no will shall be held to be revoked, or have its construction altered by a change of domicile; and that no will otherwise valid shall be invalidated by the Act, unless revoked by a subsequent will made valid by it.<sup>2</sup>

Where a will is founded on as valid under this Statute, the facts necessary to bring it under the particular provision applicable to the case must be distinctly set forth on oath by the executor (Hamilton, 21st Dec. 1872). Thus, in the case of a person who had died domiciled in British Burmah, a holograph will was admitted to confirmation only on its being deponed to by the executor that the deceased was a British subject, and had his domicile of origin in Scotland, and that the will founded on was holograph and made out of the United Kingdom (Webster, 13th Nov. 1878).

If this Act is to be understood as applicable not only to the administration but also to the distribution of the estate, it is evident that conflict might arise between it and the law of the deceased's domicile at his death, should that be in some foreign country, or even in some British Colony where this or a similar Statute has not been adopted. And even as regards administration there are cases in which the persons authorised

<sup>1</sup> Purvis' Trs. v. Purvis' Exrs., 23rd Mar. 1861, 23 D. 812.

<sup>2</sup> 24 and 25 Vict. c. 114, Appendix xi.

to administer in Scotland under this Act would not be recognised by the law of the deceased's domicile as having any title to do so. Confirmation has been granted in Scotland under a will, and in the same estate administration granted in the Court of the domicile as in an intestacy (Strachan, 24th Nov. 1880). Where a lady whose domicile of origin was in Scotland had become domiciled in New South Wales, and died leaving a holograph will executed there, naming executors, the Courts of New South Wales, holding that by their law the will was invalid, granted administration to the next of kin. And there being also estate in Scotland the administrator applied for and obtained confirmation as executor-dative *qua* next of kin, though he was also an executor nominated in the will, and might under the Statute have obtained confirmation in that character. Had the executor-nominate and administrator been different persons, and competed for confirmation, a question of some nicety would have arisen (Miller, 7th Jan. 1890).

CHAP. II.  
Wills Act  
1861.

The law as regards the administration of the estates of persons who die domiciled furth of Scotland intestate was settled in 1852. The mother of a deceased who had died domiciled in England, intestate, and predeceased by his father, had obtained letters of administration in the English Courts, and applied to the Commissary of Edinburgh for the office of executor-dative. By the law of Scotland at that time the mother was not, under any circumstances, entitled to share in the intestate succession of her child, or to administer his estate, and the Commissary, according to what had hitherto been the practice, refused the application. This judgment was reversed by the Supreme Court, and the case was remitted to the Commissary with instructions to decern as craved, on the ground that the law of the domicile must regulate the succession, whether testate or intestate, and that the party in whom the title of administration is vested should, unless there are some peculiar specialties or clear conveniences, be

Foreign  
Intestacy.

CHAP. II. the same in other countries as in the country of the domicile.<sup>1</sup>

Foreign  
Law.

Where the deceased had died domiciled in Paraguay, an application by an English administrator *pendente lite* for the office of executor-dative was rejected on the ground that he had not been appointed by the Court of the deceased's domicile, and that his appointment was merely for a temporary and limited purpose.<sup>2</sup> Even the administrator appointed by the Court of the domicile is not always preferred. Where the deceased had died domiciled in New Zealand with little or no estate there, but with personal estate in this country, the Public Trustee for that colony applied to be decerned executor-dative, producing as his title letters of administration in his favour from the Court there. His application was opposed, and the office of executor competed for by the next of kin, who were resident in Scotland. On inquiry as to the law of New Zealand regulating the appointment of the Public Trustee as administrator, it appeared that he was not entitled to interfere except in the absence of relations of the deceased; and the next of kin were accordingly preferred to the office of executor (Cormack, 30th Nov. 1885). But where the deceased had died domiciled in the colony of Victoria, and the curator of the estates of deceased persons in that colony had obtained an order from the Courts there to administer *cum testamento annexo*, the chief portion of the estate being in Victoria, and only a small portion in Scotland, and all the beneficiaries being abroad, the curator was decerned and confirmed as executor-dative (M'Gaw, 6th July 1888). And a "Curator on the vacant succession" of a deceased Frenchman appointed by the French Courts was decerned in that character (Génévrier, 2nd Nov. 1883). Where the deceased had died domiciled at Leghorn, and a decree was produced from the Court there to the effect that

<sup>1</sup> *Marchioness of Hastings v. Marquess of Hastings' Executors*, 10th Feb. 1852, 14 D. 489.

<sup>2</sup> *Whiffen v. Lees*, 12th Jan. 1872, 10 M. 797.

the widow was entitled to administer, but appointing a trustee to assist her, the widow was decerned on petition by her and the trustee (Nimmo, 5th May 1876). Where the deceased was domiciled in France, the widow was decerned on an opinion that widow and son were sole beneficiaries and administrators, and a power of attorney by both authorising the decerniture of either (Coolin, 9th Jan. 1880). Where the deceased died domiciled in Hesse, the widow was decerned *qua* relict and attorney for the children and sole heirs of the deceased, conform to power of attorney by them in her favour, and decree by the Grand Ducal Court at Worms (Valckenburg, 27th May 1887). But where the deceased had died domiciled in Uruguay, leaving a widow and minor children, the widow was decerned on her own application on evidence that, by the law of Uruguay, she was entitled to one-third of the estate, and retained the sole control of her children and their property during their minority (Bowhill, 16th Nov. 1888). Where there is no widow, the guardian appointed by the Court of the domicile for the minor children of the deceased has been decerned (Kortmeyer, 12th April 1888).

By the law of the Domicile is not necessarily meant the ordinary law of succession in the country where the deceased died domiciled. In several countries the local law is not applied to the succession of foreigners. In Belgium the validity of the will of a foreign testator who may die domiciled there is not governed by the law of that country applicable to its natural-born subjects, but by the law of the testator's own country.<sup>1</sup> Where the deceased had died domiciled in Rome, leaving a brother and a widow surviving, but no issue, decerniture was applied for by the brother, on being advised by the British Consul at Rome that the deceased being a British subject the administration would be not according to the ordinary Italian law, but according to the law of this country (Aitken, 28th Jan. 1887). Where the

CHAP.  
Foreign  
Law.

Law of  
Domicile  
special.

<sup>1</sup> Williams on *Executors*, 304.

## CHAP. II.

LAW of  
Domicile  
special.

deceased had died domiciled in the Argentine Republic evidence was obtained that, by the law of that country, unless a person has become a naturalised citizen, which can only be after twelve years' residence, and on special application, his succession is ruled by the law of his native country (M'Tavish, 9th Dec. 1873). In another case a certificate by the Peruvian Consul at Glasgow was obtained to the effect that the personal estate of the wife of a British subject, who had not become a Peruvian citizen, would, on her death, fall to be administered in accordance not with Peruvian but with British law (Irving, 25th March 1881). The succession of British subjects who die domiciled in the Turkish dominions is regulated, not by the law of Turkey, but by the law of England, under an Order in Council establishing and regulating Consular Courts in the Ottoman Empire for British subjects resident there, dated 12th December 1873;<sup>1</sup> and several cases have occurred where confirmation has been issued under the authority of this Order (Smith, 29th June 1877). A similar arrangement was established for British subjects resident in China and Japan under an Order in Council dated 9th March 1865.<sup>2</sup> But in so far as Japan is concerned this arrangement came to an end on 4th August 1899, when a new Treaty with this country came into operation, whereby the Consular Courts were superseded, and British subjects in Japan were declared to be subject as regards succession and otherwise to the ordinary laws and courts of that country.<sup>3</sup> It has been decided that the domicile which British subjects may acquire in foreign countries within the jurisdiction of British Courts established in these countries, is not such as to exempt their personal estates from the operation of the Legacy Duty Acts,<sup>4</sup> and is in other respects exceptional.<sup>5</sup>

<sup>1</sup> *London Gazette*, 16th Dec. 1873.

April 1883, vol. 23, p. 532.

<sup>2</sup> *London Gazette*, 28th April 1865.

<sup>3</sup> *Abdul Messih v. Farrer*, 13 App.

<sup>4</sup> *London Gazette*, 17th Oct. 1899.

Cases 431, *per* Lord Watson.

<sup>5</sup> *Tootal's Trusts*, L.R. Ch. D., 24th

Since the date of the decision in the Hastings case, in accordance with the instructions of the Commissary in the first similar case which occurred thereafter (Park, April 1852), applicants for the office of executor-dative, wherever it has appeared that the deceased had died domiciled furth of Scotland, have been required to set forth the law under which they claim the appointment. Where the deceased died domiciled in Costa Rica, a petition presented by the father, and claiming the office of executor-dative as having right to one-half of the estate under the Intestate Moveable Succession (Scotland) Act 1855, was refused, and a new petition setting forth the petitioner's title according to the law of Costa Rica was presented and granted (Melville, 25th Sept. 1862). The propriety of insisting on this requirement was fully considered in a case (Clark, 9th Feb. 1874) where the usual statement had been omitted in the petition. The deceased died domiciled in Canada survived by a husband and sons. The sons applied to be decerned *qua* next of kin. The husband was no party to the application. The Commissary held that the deceased having died domiciled furth of Scotland, a statement of the law regulating the succession was a matter of fact which must be averred in the application, and ordered the petition to be amended by Minute to this effect. On inquiry it was ascertained that the next of kin were entitled to administer only on the husband renouncing, and a renunciation by him was produced. Thereupon the petitioners were decerned as craved.

As regards the administration of the estate, the difficulty of determining between two domiciles is frequently obviated,—in testate cases by the will being found to be validly executed by both the laws in question (Ross, 6th May 1862), or under the provisions of the Wills Act 1861 ; and in intestate cases by the application being presented by some person who in any event would be entitled to administer the estate (Pattison, 15th Dec.

CHAP. II.  
Law  
must be  
stated.

Domicile  
doubtful.

CHAP. II. 1869 ; Alpine, 29th Jan. 1874). Thus, where the doubt is whether a Scotchman, dying unmarried and without issue, and survived by his father, has acquired a domicile in England, the father, by the law both of Scotland and England, would be the person entitled to administer, though, according to the law of England, he would be entitled to the whole estate, and by the law of Scotland might only be entitled to one-half.

Scotch and  
English  
law.

The consequences of assuming that if the estate is in Scotland the persons entitled to administer may be regulated by Scotch law might be very serious to executors and their cautioners. The cases of most frequent occurrence in which this question arises are those where the deceased has died domiciled in some country under English law.<sup>1</sup> This law differs very widely from the law of Scotland, both as regards testate and intestate succession. In England no will is valid, whether holograph or not, unless executed in presence of two witnesses. The testator signs only at the end, not also on each page or sheet, and he may sign by a mark, or any person whom he authorises may sign his name for him. A minor cannot make a will, and all wills are revoked by marriage. There are certain formalities also in the execution of wills, the observance of which requires to be set forth in the attestation clause, or otherwise proved before probate can be obtained

<sup>1</sup> English law prevails not only in England and Ireland, but, modified in some cases by local legislation, in nearly all the British colonies and dependencies. The exceptions are Trinidad (Spanish law) ; British Guiana (including Demerara, Berbice, and Essequibo), Cape of Good Hope, and Ceylon (Dutch law) ; Channel Islands (Norman law) ; Lower Canada, St. Lucia, and Mauritius (French law). See Burge on *Colonial and Foreign Law*, 4. 209 ; Tarring's *Laws relating to the Colonies*, chaps i. and iii. ; Indian

Succession Act, 1865 ; *Laws of the Australasian Colonies as to the Administration and Distribution of the Estates of Deceased Persons*, by John Dennistoun Wood, London, 1884. In the United States of America the rules of succession are generally in accordance with English law, from which they are mainly derived. Kent's *Commentaries*, ii. 544-569. Each State has the power of making its own laws on the subject. In most, if not in all of the States, the law has been codified.

(page 47). And in regard to intestate succession, when a wife dies survived by her husband, he or his representatives are entitled to administer and succeed to her whole personal estate, to the exclusion of her next of kin, and that though the estate may have been free from his control and held for her sole and separate use during her lifetime ; and the relict comes first in order as having right to administer her husband's estate. If there be no descendants and the intestate husband has died after 1st September 1890, and his whole real and personal estate does not exceed £500, the whole goes to the widow, and if it exceeds that sum she gets £500 in the first place, and her share of the residue.<sup>1</sup> Again, where a person dies intestate without wife or child, leaving a father, the father is entitled to administer and succeed to the whole estate, to the exclusion of any brothers or sisters of the deceased. Relations on the father's and mother's side rank equally as next of kin, and the half-blood shares in the succession along with the full-blood. In England also the following order in granting administration is strictly observed, and applicants must clear off all those having a prior right to the grant, either as being dead or as having renounced, or otherwise :—(1) husband or wife ; (2) children ; (3) grandchildren ; (4) great-grandchildren ; (5) father ; (6) mother ; (7) brothers and sisters, &c. In reckoning the more remote degrees of relationship also important differences exist.<sup>2</sup> The instances given, however, are sufficient to indicate the risk of neglecting careful inquiry where the law of any English-speaking country other than Scotland regulates the succession, and the same risk applies to all cases of foreign domicile. Such inquiry, undertaken in obedience to the requirement that the law of domicile shall be set forth in the petition, has in more than one case led to the

CHAP. II.  
English  
law of suc-  
cession.

<sup>1</sup> 53 and 54 Vict. c. 29.

<sup>2</sup> Tristram and Coote, *Probate Practice*, p. 100 ; Williams on *Execu-*

*tors*, pt. I., bk. ii. and bk. v., chap. 2 ; Walker and Elgood's *Compendium*, chap. vii.

CHAP. II. discovery that the applicant had no title to the estate or to its administration, and to the withdrawal of his application (Greig, Jan. 1873).

Where  
Confirmation  
competent.

The domicile of a deceased person determines the Court in Scotland in which confirmation may be granted. Where the deceased was domiciled in Scotland the application must be made in the Sheriff Court of the commissariat or county in which he had his domicile, and in the case of persons dying domiciled furth of Scotland, or without any fixed or known domicile, having personal or moveable property in Scotland, in the Sheriff Court of Edinburgh.<sup>1</sup> In applying for confirmation, therefore, it is necessary to consider not only in what country, but also, if in Scotland, in what county, the deceased had his domicile, as it is only in the Sheriff Court of that county that confirmation is competent.<sup>2</sup> That is often a very troublesome question. Where the deceased has had a fixed residence in any county and in that county only, and dies while residing there, no difficulty can arise; nor even where the residence has been temporarily left with the clear intention of being resumed. But people frequently move about from county to county under circumstances which make it extremely difficult to say whether the change is temporary or permanent; or they leave Scotland altogether, and live in England, on the Continent, or elsewhere abroad, without any intention either of abandoning Scotland as their home, or of returning to any particular county therein.

Local and  
National  
Domicile.

In these circumstances it has become the practice to distinguish between the national and the local domicile, and to hold that the former may be clearly retained though the latter may cease to be fixed or known (Meikle, 27th Aug. 1866; Lillie, 19th Oct. 1869; Smith, 9th March 1870). Of course where a close connection is maintained with the

<sup>1</sup> 21 and 22 Vict. c. 56, §§ 3, 8; 39 and 40 Vict. c. 70, § 35.

<sup>2</sup> Dowie v. Barclay, 18th March 1871, 9 M. 726.

family home, or a residence continues to be kept up, the county in which such home or residence is situated will continue to be the domicile. Where also a person continues to own property formerly occupied as a home, that also may be regarded as a link sufficient to maintain the local domicile.<sup>1</sup> But where the home or residence has been broken up, and no local tie remains,<sup>2</sup> and there is nothing to indicate in what county of Scotland any permanent residence might be resumed, the case is held to be one of Scotch domicile, but as within the limits of Scotland, of floating or uncertain domicile,<sup>3</sup> and to come under the jurisdiction conferred by Statute upon the Sheriff Court of Edinburgh, along with those cases where the uncertainty is not as to the county but as to the country of the deceased's domicile. In both cases the ground of doubt should be made to appear in the application.<sup>4</sup>

The domicile of the deceased determines the incidence of the death duties. Where the deceased has died domiciled within the United Kingdom his whole personal estate wheresoever situated and his whole heritable estate in this country, are, unless specially exempted, subject to Legacy or Succession Duties. Where the deceased has died domiciled abroad, only his heritable estate in this country is subject to these duties. Formerly all personal estate within the United Kingdom was subject also to Probate or Inventory duty wherever the owner died domiciled. But these

Domicile  
and Death  
Duties.

<sup>1</sup> *Hamilton v. Hardie*, 7th Dec. 1888, 16 R. 192.

<sup>2</sup> *Vincent v. Earl of Buchan*, 19th March 1889, 16 R. 637.

<sup>3</sup> *Arnot v. Groom*, 24th Nov. 1846, 9 D. 142, *per* Lord Jeffrey.

<sup>4</sup> In order to avoid the difficulties and uncertainties connected with the question of domicile as between one county and another, it has for many years been urged, hitherto

without success, that as in England and Ireland executors may complete their title either in the local or in the metropolitan Court, executors in Scotland should have a like option—an option also which already exists in Scotland in the service of heirs to real property. See *Alexander's Practice*, 38. 208; *Dove Wilson on Law of Process*, 68.

CHAP. II. latter duties have been superseded by the Finance Act 1894,<sup>1</sup> and a new duty imposed, called Estate duty, the incidence of which is assimilated to that of the Legacy and Succession duties. The result is, that where the deceased died domiciled in the United Kingdom, his whole personal estate wherever situated, subject to special exceptions, and his whole heritable estate in the United Kingdom, is liable in Estate duty and Legacy or Succession duty. Where the deceased has died domiciled abroad, any personal estate he may have in the United Kingdom is liable to Estate duty only, and any heritable estate so situated to Estate duty as well as Legacy or Succession duty.<sup>2</sup> But if a person domiciled abroad has directed part of his moveable estate to be invested in this country in trust for one person in liferent and another in fee, the fund so settled as a fund to be administered exclusively according to the law of this country will be subject to Succession duty when the fiars right to possession emerges on the death of the liferenter.<sup>3</sup> And when a person domiciled abroad had assigned to trustees his interest in a British succession for behoof of his children, reserving only a liferent, it was held that the children were liable in payment of Succession duty upon their respective shares.<sup>4</sup>

The effect of domicile in determining what estate may be included in an inventory and in the supervening confirmation, and in regulating the deduction of debts and fixing the net value of estate on which duty is payable, will be fully considered when dealing with the contents of the Inventory.<sup>5</sup>

In the year 1861, a Statute (dated 6th August)<sup>6</sup> was passed to amend the law in relation to the wills and domicile of British subjects dying whilst resident abroad, and of foreign

Conven-  
tions regu-  
lating  
Domicile.

<sup>1</sup> 57 and 58 Vict. c. 30.

<sup>2</sup> *Hanson's Death Duties*, 19, 41, 88.

<sup>3</sup> *Duncan's Trustees v. M'Craken*, 20th March 1888, 15 R. 638.

<sup>4</sup> *Littledale's Trustees v. Lord Advocate*, 24th Nov. 1882, 10 R. 29

<sup>5</sup> See Chapter VI.

<sup>6</sup> 24 and 25 Vict. c. 121.

subjects dying whilst resident within the British dominions. It proceeded on the preamble that, "by reason of the present law of domicile, the wills of British subjects dying whilst resident abroad are often defeated, and their personal property administered in a manner contrary to their expectations and belief," and provided for conventions being made between the British Government and any foreign State, regulating the acquirement of domicile by the subjects of the one in the territory of the other, and the administration of the estates of foreigners dying in this country. The evils this Statute was designed to remove were, as regards testate succession, to a large extent met by the Wills Act passed in the same year, and no Convention under it has ever been made. But a declaration on the subject of domicile between Great Britain and the Canton de Vaud relating to the incidence of Government duties was signed on 27th August 1872.<sup>1</sup>

<sup>1</sup> Hertslet's *Treaties*, 13. 834.

## CHAPTER III.

### TESTAMENTARY WRITINGS.

CHAP. III. It is proposed in this chapter to inquire what Testamentary Writings may be founded on in applications for confirmation as executor-nominate, or for appointment as executor-dative *qua* disponent or legatee.

What Deeds confirmed. The testamentary writings upon which applications for confirmation are founded must be validly executed according to the law which regulates their validity (page 19). By the law of Scotland, wills must be either attested by two witnesses, or holograph of the testator. If on the face of the documents all the formalities of execution required by the law appear to have been complied with, and no one appears to object, no further evidence of validity is required. If these formalities have not been complied with, or if the due execution is challenged by any one having an interest, a proof will be allowed. By the Sheriff Court (Scotland) Act of 1877, when in any action competent in the Sheriff Court a deed or writing is founded on by either party, all objections thereto may be stated and maintained by way of exception, without the necessity of bringing a reduction thereof.<sup>1</sup> The practice, however, has been to hold that where the formal execution of the will is not challenged, or has been proved, and objection to its validity is taken on other grounds, it cannot be set aside until it has been reduced by the Supreme Court. And the executor named in such a will may even in some cases insist upon confirmation though an action of

<sup>1</sup> 40 and 41 Vict. c. 50, § 11.

reduction has been raised. In a competition for confirmation CHAP. III.  
 between an executor-nominate and the next of kin, where Practice  
where will  
challenged.  
 the ground of challenge was that the deed founded on was fraudulent and *ultra vires* of the testator, although it was alleged that the deed was under reduction, the executor-nominate was preferred to the next of kin by the Commissaries, and this judgment was affirmed by the Supreme Court.<sup>1</sup> And where an application for confirmation in the Sheriff Court of Lanarkshire by executors nominated in a disposition and deed of settlement was objected to on an allegation that the deceased died domiciled in England, and that therefore the will ought to have been proved there, and further, that the deed was liable to reduction on the ground of incapacity and undue influence, it was held that no ground had been set forth to justify the Court in interfering with the granting of confirmation.<sup>2</sup> But where the question was as to the genuineness of a holograph writing, and the Commissary had ordered proof, and decided that the writing was not genuine, this decision was affirmed by the Supreme Court and by the House of Lords, without any question as to its competency.<sup>3</sup> And a plea of *res judicata* founded on this decision was held by the Supreme Court effectual to bar the reopening of the question by a party having a beneficial interest.<sup>4</sup> Where the ground of challenge was that the docquet of the notary by whom the deed was executed was not holograph, and the Commissary Depute had held that although there might be good grounds for reducing the alleged will, it afforded while unreduced a sufficient title *ex facie* in a question as to the appointment of executor,—this view was repelled by the Commissary, who found the will invalid; and on appeal the Supreme Court

<sup>1</sup> *Graham v. Bannerman*, 28th Feb. 1822, 1 S. 362.

<sup>2</sup> *Hamilton v. Hardie*, 7th Dec. 1888, 16 R. 192.

<sup>3</sup> *Anderson v. Gill*, H.L., 16th April 1858, 3 Macq. 180.

<sup>4</sup> *Ibid.* 22nd Dec. 1860, 23 D. 250.

CHAP. III. adhered.<sup>1</sup> Where objections were lodged to confirmation being issued under a will which, it was alleged, was revoked by a subsequent letter narrating that it had been destroyed, the Sheriff allowed a proof that the document founded on was a valid and subsisting will at deceased's death (Glas, 4th Nov. 1887). But where an executor-nominate in a petition for warrant to issue confirmation alleged, and was prepared to depone, that the deceased died domiciled in Scotland, by the law of which the will founded on was validly executed, and an objector appeared and alleged that the deceased died domiciled in England, by the law of which the will was invalid, and also that at the time of making it the testator was not responsible for his actions,—the Sheriff sisted the cause for a month to allow the objector to raise an action of reduction in the Supreme Court, and, on the action being raised, continued the sist until the action should be determined (Munro, 3rd June and 19th July 1889); and the will having been reduced the petition was refused, and warrant granted to issue confirmation under a will of prior date which thereby became operative (20th June 1890). Where an application for confirmation by an executor-nominate was opposed by the next of kin who stated that an action had been raised to reduce the will on the ground of the incapacity of the testator, and the Sheriff had sisted the process, the Supreme Court, on appeal, as the estate seemed to be at some risk, in the meantime, dismissed the application and appointed a judicial factor.<sup>2</sup>

Validity  
doubtful.

#### ATTESTED DEEDS.

Attestation previous to Oct. 1874. By the law of Scotland previous to 1874 certain solemnities, prescribed by a series of Scots Acts,<sup>3</sup> were essential in the execution of all attested deeds. The granter had to sign

<sup>1</sup> Henry v. Reid, 10th Feb. 1871, 1895, 23 R. 90.

9 M. 503.

<sup>3</sup> Acts 1540, c. 117; 1579, c. 80;

<sup>2</sup> Campbell v. Barber, 7th Nov. 1593, c. 25; 1681, c. 5; 1696, c. 15.

not only at the end of the deed, but on each page, or at least on each separate sheet ; two witnesses had to attest his signature by signing at the end of the deed ; the names and designations of the writer of the deed and of the attesting witnesses had to be mentioned in the testing clause or in the deed itself ; and the number of pages on which the deed was written had to be mentioned at the end of the last page. Any deed in which, on the face of it, these requisites had been complied with was held entitled to confirmation without question. Pagination, or the marking of each page by progressive numbers, which had also been indispensable under these Acts,<sup>1</sup> had been declared by Statute to be no longer necessary.<sup>2</sup> Previous to 1874, also, there was no provision by which any informality of execution could be remedied.

By the Conveyancing Act of 1874,<sup>3</sup> it was enacted that "It shall be no objection to the probative character of a deed, instrument, or writing, whether relating to land or not, that the writer or printer is not named or designed, or that the number of pages is not specified, or that the witnesses are not named or designed in the body of such deed, instrument, or writing, or in the testing clause thereof, provided that, where the witnesses are not so named and designed, their designations shall be appended to or follow their subscriptions ; and such designations may be so appended or added at any time before the deed, instrument, or writing shall have been recorded in any register for preservation, or shall have been founded on in any Court, and need not be written by the witnesses themselves" (§ 38). Under this section a deed is now held to be probative and entitled to confirmation if it be signed by the grantor at the end, and on each page or separate sheet ; if two witnesses have attested the signature by signing at the end ; and if the

Attestation on or after 1st Oct. 1874.

<sup>1</sup> Thomson v. McCrummen's Trs., 1st Feb. 1856, 18 D. 470, H.L., 24th March 1859, 31 Scot. Jur. 425.

<sup>2</sup> 19 and 20 Vict. c. 89, § 1.

<sup>3</sup> 37 and 38 Vict. c. 94.

CHAP. III. designations of the witnesses are either mentioned in the body of the deed or in the testing clause, or appended to their signatures.<sup>1</sup>

Informal  
execution.

By the same Statute it is enacted that "No deed, instrument, or writing, subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested, was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same; and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to, or in a special application to the Court of Session, or to the Sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such granter or maker and witnesses" (§ 39).

Essential  
requisites.

Under this section the only essential requisites in the execution of an attested will are that it shall be subscribed by the granter, and that it shall bear to be attested by two witnesses subscribing. If it has these it is not necessarily null; but if it is wanting in any of the formalities of execution not dispensed with by the previous section, it will not be entitled to confirmation until it has been proved in the manner set forth that the writing was subscribed by such granter and witnesses. Accordingly, a will written on more than one sheet, and signed only at the end by the testator and three witnesses who were not designed, was, on a special application to the Court of Session, after proof, found to be duly subscribed by the granter and the subscribing witnesses, the designations of the latter being given in the interlocutor; and

<sup>1</sup> *McLaren v. Menzies*, 20th July 1876, 3 R. 1155, *per* Lord Deas.

an extract of the finding was produced in the Commissary Court along with the will, and founded on in the application for confirmation.<sup>1</sup> The remedy provided by this section was also found available to prove the execution of a writ wanting in the designation of the witnesses, after it had been exhibited and recorded with an inventory ;<sup>2</sup> and also when a deed was partly written and partly printed.<sup>3</sup> And in a case where a deed had been recorded in the Books of Council and Session, without the designations of the witnesses being added, and an extract was exhibited along with the inventory for confirmation, the Sheriff, on a special application, allowed a proof of the due execution ; and, on the evidence of the witnesses whose signatures were appended, held the deed to be duly executed for the purpose of confirmation, and granted authority to issue confirmation in favour of the executor named therein (Lockhart, 13th July 1882). It has been decided by the House of Lords, affirming the judgment of the Court of Session, that the operation of these sections is not retrospective, and that they do not apply to any deed executed prior to the commencement of the Act on 1st October 1874.<sup>4</sup>

CHAP. III.  
What may  
be proved.

The same Statute also granted facilities for the execution of all deeds notarially. Formerly a will could be subscribed for a person unable to write only by a notary public, or a parish minister, including, it would appear, the minister of a parish *quoad sacra* (but not his assistant) acting within his own parish.<sup>5</sup> But it was enacted that " Without prejudice to the present law and practice, any deed, instrument, or writing, whether relating to land or not, may, after having been

Notarial  
execution

<sup>1</sup> M'Laren v. Menzies, 20th July 1876, 3 R. 1151. See also Addison, 23rd Feb. 1875, 2 R. 457, and Brown, 22nd Dec. 1883, 11 R. 400.

<sup>2</sup> Thomson's Trustees v. Easson, 2nd Nov. 1878, 6 R. 141.

<sup>3</sup> Nisbet, 23rd Jan. 1897, 24 R. 411.

<sup>4</sup> Gardner v. Lucas, H.L., 21st March 1878, 5 R. 105.

<sup>5</sup> Erskine, 3. 2. 23 ; 7 and 8 Vict. c. 44, § 8 ; Hutton v. Harper, H.L., 3 R. 9.

CHAP. III. read over to the granter, be validly executed on behalf of such granter, who, from any cause, whether permanent or temporary, is unable to write, by one notary public or justice of the peace subscribing the same for him in his presence and by his authority, without the ceremony of touching the pen, all before two witnesses, and the docquet thereto shall set forth that the granter of the deed authorised the execution thereof, and that the same had been read over to him in presence of the witnesses. Such docquet may be in the form set forth in Schedule I. hereto annexed, or in any words to the like effect" (§41). The docquet in the schedule is in the following terms:—"By authority of the above named and designed A. B., who declares that he cannot write, on account of sickness and bodily weakness [*or, never having been taught, or otherwise, as the case may be*], I., C. D. [*design him*], notary public [*or justice of peace for the county of (name it; or, as regards wills or other testamentary writings executed by a parish minister as notary public in his own parish, minister of the parish of (name it)*], subscribe these presents for him, he having authorised me for that purpose, and the same having been previously read over to him, all in presence of the witnesses before named and designed, who subscribe this docquet in testimony of their having heard [*or seen*] authority given to me as aforesaid, and heard these presents read over to the said A. B.

Notarial  
docquet.

E. F., *witness*. (Signed) A.B., Notary Public [*or Justice of the Peace, or Parish Minister*]."  
G. H., *witness*.

The letters "A. B." in the signature to the above docquet, as it appears in the Statute are manifestly a misprint for "C. D." A docquet otherwise sufficient has been held not to be rendered invalid by its disconformity with this schedule.<sup>1</sup> Where the docquet bore that the deed had "been previously gone over and explained" to the granter, but not that it had been "read over" to him, the question whether

<sup>1</sup> Aitchison's Trs. v. Aitchison, 21st Jan. 1876, 3 R. 388.

the deed was validly executed was raised, but not finally decided.<sup>1</sup> CHAP. III.

In practice, the notary sometimes signs his own name at the end of the deed before appending his docquet, less frequently the name of the testator, but neither appears necessary. The notary's docquet, and his subscription thereto, form the legal equivalent for the subscription of the testator (Murray, 24th November 1891).<sup>2</sup> The docquet must be holograph of the notary<sup>3</sup> or Justice of the Peace<sup>4</sup> who signs it, and the defect cannot be remedied after the testator's death.<sup>5</sup> And where a trustee had acted as notary in executing the will, it was held invalid.<sup>6</sup> Notarial signature.

A testamentary deed may be written either in ink or pencil,<sup>7</sup> and no stamp is necessary. By the Titles to Land Act 1868, all deeds having a testing clause may be partly written and partly printed, or engraved or lithographed, "provided always that in the testing clause the date, if any," and certain other particulars now dispensed with, "shall be expressed at length."<sup>8</sup> In testamentary writings the date is not a statutory requisite, nor is it necessary that the place of execution be mentioned, though it is useful and usual to set forth both date and place in the testing clause. It is not necessary that the witnesses should sign at the same time as the grantor of a deed,<sup>9</sup> or in his presence,<sup>10</sup> or even in his lifetime,<sup>11</sup> but they must have seen him sign or heard him acknowledge his signature.<sup>12</sup> The provisions of a deed Wills in ink or pencil, or printed.  
Execution of wills.

<sup>1</sup> *Watson v. Beveridge*, 24th Oct. 1883, 11 R. 40.

<sup>2</sup> *Mathieson v. Hawthorns & Co.*, 27th Jan. 1899, 1 F. 463.

<sup>3</sup> *Henry v. Reid*, 10th Feb. 1871, 9 M. 503.

<sup>4</sup> *Irvine v. M'Hardy*, 5th Feb. 1892, 19 R. 458.

<sup>5</sup> *Campbell v. Purdie*, 12th March 1896, 22 R. 443.

<sup>6</sup> *Ferrie v. Ferrie's Trs.*, 23rd July 1863, 1 M. 291.

<sup>7</sup> *Muir's Trustees*, 23rd Oct. 1869, 8 M. 53; *Simsons v. Simsons*, 19th July 1883, 10 R. 1247.

<sup>8</sup> 31 and 32 Vict. c. 101, § 149.

<sup>9</sup> *Stewart v. Burns*, 1st Feb. 1877, 4 R. 427.

<sup>10</sup> *Thomson v. Clarkson's Trs.*, 18th Nov. 1892, 20 R. 59.

<sup>11</sup> *Tener's Trs. v. Tener's Trs.*, 28th June, 1879, 6 R. 1111.

<sup>12</sup> *Geddes v. Reid*, 16th July 1891, 18 R. 1186.

CHAP. III. cannot be altered or added to in the testing clause.<sup>1</sup> Where a testator had directed her trustees to pay any legacies given by any writing under her hand clearly expressive of her wishes, an informal writing, neither holograph nor tested but signed by her, was held to be effectual.<sup>2</sup> A testing clause may be inserted at any time before the deed is judicially founded on.<sup>3</sup> By the Act of 1868, section 139, it is declared that females above the age of fourteen are competent instrumentary witnesses; and it is no objection to a witness that he is a trustee or even a beneficiary under the deed whose execution he attests.<sup>4</sup> A mutual settlement by a husband and wife, signed by the husband before witnesses, and by the wife, but not before witnesses, has been held valid as regards the husband's estate.<sup>5</sup>

Witnesses. Signature. Signature by a mark is not sufficient in Scotland; neither is signature by initials,<sup>6</sup> unless it can be proved that this was the subscriber's usual method of signing.<sup>7</sup> The signature must be written, and not impressed by a stamp, but it is immaterial whether it is legible or not, and may be sufficient, though retouched after execution;<sup>8</sup> and in signing, the subscriber's hand may be held and steadied, but not led.<sup>9</sup> A signature, though imperfect or incomplete, has, if duly attested, been sustained (Alexander, 11th May 1885; Rae, 15th October 1886). Wills with the testator's name written by himself, not at the end but in the middle of the testing clause, which occurs frequently where a printed form is used, have been held duly signed (Turnbull, 3rd May 1876; Reaves, 26th Feb. 1879; Wilson, 20th Nov. 1886). A

<sup>1</sup> Blair v. Assets Co., H.L., 15th May 1896, 23 R. 36.

<sup>2</sup> Fraser v. Forbes' Trs., 3rd Feb. 1899, 1 F. 513.

<sup>3</sup> Hill v. Arthur, 6th Dec. 1870, 9 M. 223; Veasey v. Malcolm, 2nd June 1875, 2 R. 748; Millar v. Birrell, 8th Nov. 1876, 4 R. 87.

<sup>4</sup> Simsons v. Simsons, 19th July

1883, 10 R. 1247.

<sup>5</sup> Millar v. Birrell, *supra*.

<sup>6</sup> Gardner v. Lucas, H.L., 21st March, 1878, 5 R. 105.

<sup>7</sup> Spiers, 19th July 1879, 6 R. 1359.

<sup>8</sup> Stirling Stuart v. Stirling Crawford, 6th Feb. 1885, 12 R. 610.

<sup>9</sup> Noble v. Noble, 5th Nov. 1875, 3 R. 74.

testamentary deed with the signature of the testator written on an erasure, and *ex facie* attested by two witnesses, was sustained in respect the objector on whom the *onus* was held to rest had failed to prove either that the signature was not genuine, or that it was not duly attested.<sup>1</sup>

## HOLOGRAPH WILLS.

Though not attested or signed before witnesses, a will is valid by the law of Scotland if it is holograph of the testator. "Holograph Wills subscribed are unquestionably the strongest probation by writ, and least imitable, but if they be not subscribed they are understood to be incomplete acts from which the party hath resiled. Yet, if they be written in count books or upon authentic writs they are probative, and resiling is not presumed."<sup>2</sup> A writing on two pieces of paper found in the same envelope, one commencing with the name of the testator, and the other signed by her initials, which was proved to be her usual method of signing, was held to constitute a valid will.<sup>3</sup> Where a holograph will was written on two unconnected sheets, one commencing with the testator's full name, but not signed, and the other being signed and having a holograph signed codicil appended, both sheets being found together in the private desk of the deceased, warrant was granted to confirm the executor named therein (Brown, 29th May 1884). But a document commencing with the name of the testator, and setting forth that he had written it with his own hand, and where and when he had done so, and found in his repositories unsigned, was held invalid, and of no effect ;<sup>4</sup> and a writing in pencil, on the outside of a trust settlement disposing of the residue of

Subscription of  
holograph  
wills.

<sup>1</sup> Brown v. Duncan, 9th March 1888, 15 R. 511.

<sup>3</sup> Spiers, 19th July 1879, 6 R. 1359.

<sup>4</sup> Skinner v. Forbes, 13th Nov.

<sup>2</sup> Stair, 4. 42. 6; Dunlop v. Dunlop, 11th June 1839, 1 D. 913.

1883, 11 R. 88.

CHAP. III. the testator's estate, holograph but unsigned, was held to be ineffectual,<sup>1</sup> as were also the words "Lewis Shedden, i leave this to my sister Janet Shedden," written on the back of a bank deposit receipt.<sup>2</sup> But where below the signature to a holograph settlement an addition, also holograph, but not signed, had been made, containing bequests, it was held to be effectual as part of the settlement;<sup>3</sup> and in a special case, where the circumstances were held to be such as to displace the presumption that an unsigned holograph will was incomplete, it was sustained as a valid testament,<sup>4</sup> and a warrant to issue confirmation under it was granted on production of the special case and judgment (Russell, 18th Jan. 1884). Where a holograph will beginning with testator's name, but not signed, was enclosed in an envelope inscribed "My Will," and the inscription signed by the testator, it was held to be valid, and warrant to issue confirmation under it was granted on proof that the will had been found in the envelope in the deceased's repositories (Wyld, 27th Oct. 1887). Confirmation was issued in favour of executors nominated in a holograph will written on three sheets, but signed only at the end, in respect that the nomination was repeated and homologated in a holograph codicil written all on one sheet (Robertson, 22nd May 1886). Where a petition was presented for warrant to issue confirmation under a settlement extending to nine pages, written on three sheets of paper book-wise and unstitched, and expressly bearing to be written by the granter, the document being dated, but signed upon the last page only, and alleged to have been found in the deceased's repositories exactly as it was produced with the petition, the Sheriff-Substitute allowed a proof that

<sup>1</sup> Pettigrew, 6th Dec. 1884, 12 R. 249.

<sup>2</sup> Goldie v. Shedden, 4th Nov. 1885, 13 R. 138.

<sup>3</sup> Burnie's Trustees v. Lawrie, 17th July 1894, 21 R. 1015.

<sup>4</sup> Russell's Tra. v. Henderson, 11th Dec. 1883, 11 R. 283. But see opinions of the judges in Goldie v. Shedden, *supra*, as to the effect of the decision in this case.

the whole writing founded on was the deed signed by the grantor ; but an appeal against this interlocutor was sustained by the Supreme Court, on the ground that in such a case no proof was necessary, as the document contained sufficient inherent evidence that it formed one consecutive deed.<sup>1</sup> It was observed, however, that there might be "cases of detached documents not necessarily showing themselves to be part of one writing, and therefore not necessarily authenticated by the signature at the end," and that in such cases proof would be required "that they formed one writing, including evidence, it may be, as to when the document or its alleged parts were formed, as bearing on the question *whether the detached parts did form one whole.*"<sup>2</sup> Though it has been decided, therefore, that a holograph will does not necessarily require to be signed on each page or sheet to entitle it to confirmation without proof, such as would be required in the case of an attested deed, the question whether the integrity of the writing is to be inferred from the document itself will depend upon the special circumstances of each case.

CHAP. III.  
On each  
page not  
essential.

A deed may be entitled to effect as a holograph writ, though not entirely in the handwriting of the maker, if it is so "in its substantial parts."<sup>3</sup> But a writing addressed "To my Executors" in the handwriting of the deceased, and signed by him, in which no words conferring a bequest, setting forth the sum, or specifying the legatee, were holograph, was held to be inoperative.<sup>4</sup> An opinion had been expressed that a will of which the formal clauses were lithographed, but the names of the testator and trustees, and the effective words disposing of the estate were in the testator's handwriting, was holograph of the testator.<sup>5</sup> But it has since been decided by the First Division (*diss.* Lord M'Laren) that a printed form of

Writings  
partly  
holograph.

<sup>1</sup> Cranston and Another, 11th Jan. 1890, S.L.R. 27. 305 ; 17 R. 410.

<sup>2</sup> *Per* Lord Shand.

<sup>3</sup> Erskine, 3. 2. 22

<sup>4</sup> Maitland, 10th Nov. 1871, 10 M. 79.

<sup>5</sup> *Per* Lord Gifford, A.'s Executor v. B. and Others, 22nd Jan. 1874, S.L.R. 11, p. 259.

CHAP. III. will with blank spaces into which the deceased person who had signed it had inserted his own name as Testator, the names of the legatees and that of the executor could not receive effect as a holograph will.<sup>1</sup> A holograph codicil inserted at the end of an attested deed above the Testator's signature was sustained as valid.<sup>2</sup> Where a person signed a document (not a will) prefixing the words "Adopted as holograph" in his own handwriting, it was held that the whole document was to be regarded as holograph.<sup>3</sup> And a warrant was granted to confirm executors named in a settlement not in the handwriting of the deceased, but which she had signed, adding the words, "I adopt the above as holograph," and again signing her name, on an affidavit by two persons acquainted with the handwriting of the deceased, and who had examined the document, that the words so added were holograph of the testator (Adam, 3rd May 1890).

"Adopted as holograph."

Wills bearing to be holograph.

"Holograph writings ought regularly to mention that they are written by the granter, in which case they are presumed holograph unless the contrary be proved. But should this be neglected, a proof of holograph will be admitted either *comparatione literarum*, or by witnesses who saw the deed written and signed."<sup>4</sup> When the authenticity of a holograph writing is challenged, the onus of proving that it is genuine lies on the party founding on it, and it is not enough to prove that the writ and the signature are in the same handwriting, but it must be proved that both are written by the person by whom it professes to have been executed.<sup>5</sup> Where there was an obvious discrepancy between the handwriting and the signature in a will bearing to be holograph, confirmation was authorised only after proof that the deceased wrote two distinct hands, and that both the will and the signature had

<sup>1</sup> M'Donald v. Cuthbertson, 14th Nov. 1890, 18 R. 101.

1883, 10 R. 448.

<sup>2</sup> Gray's Trs. v. Dow, 7th Nov. 1900, 3 F. 79.

<sup>4</sup> Erskine, 3. 2. 22.

<sup>5</sup> Anderson v. Gill, H.L., 16th April 1858, 3 Macq. 180.

<sup>3</sup> Gavine's Trs. v. Lee, 12th Jan.

been written by him (M'Donald, 16th Dec. 1881). Generally, however, where the validity of a writing is not challenged by any one compearing to oppose the confirmation, and it bears *in gremio* to be in the handwriting of the granter, it is accepted as *ex facie* valid, and entitled to confirmation, and the practice on this point has been formally recognised and sanctioned by the Supreme Court.<sup>1</sup> CHAP. III.

In regard to the confirmation of holograph wills which do not *in gremio* bear to be so, it was observed in the case last referred to that "before such a document can be held to be entitled to effect in any question of title or of transfer of property, it is clear that some evidence is necessary to instruct that it was truly the deed of the alleged granter—that is, that it is in his handwriting," and that "according to sound principle proof that the writing is that of the deceased should be required in such cases before confirmation is granted."<sup>2</sup> The evidence of a writing being holograph, which may be considered equivalent to a statement to that effect in the writing itself, will depend upon the circumstances of the case. It has always been the practice to require the fact of a will being holograph to be set forth in the executor's oath to the inventory, but this is not now considered sufficient, and in addition thereto, where such a writing is founded on, an affidavit by two persons that the writing is holograph is required. Such an affidavit may be appended to the executor's oath or petition, but the simplest and most satisfactory method in which the necessary evidence can be supplied and preserved is by appending an affidavit to the document itself, or to an extract thereof [FORM 10]. In applications under the Small Estates Acts the evidence can be included in the proof which the clerk may require to satisfy him of the applicant's title.

It is declared by Statute that every holograph writing of Wills not bearing to be so.

<sup>1</sup> Cranston and Another, 11th Jan. 1890, S.L.R. 27. 305 ; 17 R. 410.

<sup>2</sup> Per Lord Shand, pp. 413, 414.

Date of holograph wills.

CHAP. III. a testamentary character shall, in the absence of evidence to the contrary, be deemed to have been executed or made of the date it bears.<sup>1</sup>

Mutual  
holograph  
writings.

A mutual will by husband and wife, in the handwriting of the former, is valid as regards his estate;<sup>2</sup> and so a mutual will, duly executed by husband and wife before two witnesses in 1870, but in which the name of the writer was omitted, was held valid as regards the husband's estate, on its being deponed to that it was holograph of him (Brown, 28th May 1883); and the following will by a husband and wife, written by the former:—"I, A. B., do hereby will and bequeath all that belongs to me at my death to my wife, C. D., and she does also the same to me, should such be, so that the longest liver gets all that belongs to either of us; witness our hand of writing, (signed) A. B., C. D."—was held valid as A. B.'s will (Hunter, 7th June 1883). A mutual holograph settlement will be effective as regards the estate of either party if executed in duplicate, each copy being in the handwriting of one of the parties and signed by both (Jarvie, 6th Oct. 1887).

Drafts, etc. It is sometimes difficult to determine whether a writing is entitled to receive effect as a completed will, or whether it is merely deliberative.<sup>3</sup> A memorandum signed by a testator, "to let her agent know," etc., was held ineffective;<sup>4</sup> and a document holograph of, and signed by, the deceased, and headed "Draft of a Codicil" was also held to be inoperative.<sup>5</sup> But a holograph writing, headed "Notes of an intended settlement, by A. B.," and signed by him, was held to be a valid testamentary settlement;<sup>6</sup> and a holograph document,

<sup>1</sup> 37 and 38 Vict. c. 94, § 40.

<sup>2</sup> *Macmillan v. Macmillan*, 28th Nov. 1850, 13 D. 187.

<sup>3</sup> *Munro v. Coutts*, 3rd July 1813, H. L., 1 Dow, 437; *Stainton v. Stainton*, 17th Jan. 1828, 6 S. 363; *Scott v. Scales*, 5th Feb. 1864, 2 M. 613; *Simsons v. Simsons*, 19th

July 1883, 10 R. 1247.

<sup>4</sup> *Cunningham v. Murray's Trs.*, 15th March 1871, 9 M. 713.

<sup>5</sup> *Forsyth's Trs. v. Forsyth*, 13th March 1872, 10 M. 616.

<sup>6</sup> *Whyte v. Hamilton*, 13th July 1881, 8 R. 940, H.L. 9 R. 53.

bearing to be "Heads by A. B. for his Last Will and Testament," and signed by him, was held to be a valid will, and the executors named therein confirmed (Tod, 17th Jan. 1859). A document headed "Instructions to make a Will," was proved in England as a will, and the probate certified (Tennant, 3rd July 1867).

Confirmation proceeds either upon production of the principal testamentary writing or of a legally authenticated copy thereof. Extracts from the Books of Council and Session, or of any Sheriff Court, or from the Register of Sasines, where the writ has been registered for preservation as well as for publication, under the Land Registers Act 1868,<sup>1</sup> are accepted as authentic and equivalent to the registered writs themselves.

#### ENGLISH AND FOREIGN WILLS.

Where the validity of a Testamentary Writing founded on falls to be determined by the law of England, and the writing bears to be signed by the testator and two witnesses, and has the usual attestation clause to the effect that the formalities of execution required by the law of England have been complied with, no further evidence of validity is required, unless there is something on the face of the document to suggest defect or irregularity. The formalities of execution and attestation according to English law are fixed by Statute, and are as follows:—"No will (which includes codicil or other testamentary disposition) shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall

<sup>1</sup> 31 and 32 Vict. c. 64, § 12.

## CHAP. III.

English  
wills.

attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.”<sup>1</sup> Although no form of attestation is necessary, if there is no attestation clause, or if there is a clause which does not state a performance of all the prescribed ceremonies, an affidavit is required from one of the subscribing witnesses, by which it must appear that the will was executed in compliance with the Statute, before probate can be obtained ; though this rule may be dispensed with if the witnesses, after diligent inquiry, are not forthcoming. The following is an example of a complete attestation clause, and is that in common use : “ Signed and declared by the above named testator, as and for his last will and testament, in the presence of us present at the same time, who, in his presence and in the presence of each other, have hereunto set our names as witnesses thereto,—John Styles, Richard Nokes.”<sup>2</sup> Where a will is signed by a mark or by some person for the testator, the Probate Court requires to be satisfied by affidavit that the will was read over to deceased before its execution, or that he at the time knew its contents (Glendinning, 27th Sept. 1889). Where an English will is presented for confirmation without a complete attestation clause, as above set forth, it is the practice to require, and to record along with it, an affidavit to the same effect as would be required by the English Court before granting probate (Fyffe, 31st March 1866), (Thomson, 9th July 1874). [FORM 11.] If the attestation clause of the will be imperfect, but a codicil thereto has been subsequently executed containing a perfect attestation clause, no affidavit is required as to the due execution of the will<sup>3</sup> (Simpson, 20th September 1887). Should, however, there be anything in the appearance of the writing to suggest informality or irregularity in its execution, or any reason to doubt whether English law is applicable to the case,

<sup>1</sup> 1 Vict. c. 26, § 9 (1837).<sup>2</sup> Williams on *Executors*, 82, 271.<sup>3</sup> Tristram and Coote's *Probate Practice*, p. 68.

evidence of validity may be required before confirmation CHAP. III.  
is granted.

Where the validity of a will founded on falls to be deter- Foreign wills.  
mined neither by the law of Scotland nor by English law,  
evidence of its validity in all cases requires to be produced.  
If the principal will is exhibited, it must be accompanied by  
the testimony of a judge, notary, barrister, or other qualified  
person that it is validly executed according to the forms  
required by the law which regulates its validity. No par-  
ticular form of evidence is insisted on. It may be a judg-  
ment of Court, an opinion of counsel, an affidavit, or a  
notarial certificate, according to the forms which may be in  
use in the country from which it comes [FORM 12].

If a will has been proved, or otherwise officially recognised Probates.  
as valid, in the Courts of deceased's domicile, the probate  
or letters of administration with the will annexed,—or an  
exemplification of said probate or letters,—or an official  
copy of the will under the hand of the registrar or other  
officer of Court by whom it has been registered, and who has  
the principal will in his custody, with a certificate by him  
that it has been proved or recognised as valid—are accepted  
as authentic copies of validly executed wills; a mere office  
copy, which is neither signed nor sealed, is not sufficient.<sup>1</sup>

The document produced as the ground of confirmation Notarial copies.  
from Continental countries, and from colonies or settlements  
planted by them, though now it may be under British rule,  
is usually neither the will itself, nor a probate thereof, nor an  
extract from the records of any Court, but a notarial copy of  
the will, granted and authenticated by the notary, with whom  
by law the principal must remain deposited. In these cases  
evidence is required, as in the case of a principal deed, that  
the will is validly executed, and also that the notarial copy  
is entitled to the same credit and effect as if it were the  
principal will [FORM 12].

<sup>1</sup> *Stiven v. Myers*, 29th May 1868, 6 M. 885.

## CHAP. III.

Proof of  
Foreign  
docu-  
ments.

Documents from the Courts of Great Britain or any British colony or dependency bearing to be signed by the officials of these Courts are received as genuine without any further authentication, but documents which come from the Courts of any foreign state should be authenticated by a British Consul or Notary Public resident there.<sup>1</sup> The certificate of the Consul of a foreign state resident in this country has sometimes been accepted as evidence of the authenticity and effect of a document coming from the state which he represents [FORM 12A].

Transla-  
tions.

Documents in a foreign language must be accompanied with translations certified as correct. But a certified translation alone is not sufficient: the principal will, or an authentic copy of it, must always be produced, and it and the translation are both recorded (Flahault, 12th Jan. 1871; Chauvin, 20th April 1881).

Warrant  
to confirm.

In the event of there being any informality of execution; or unauthenticated deletions or interlineations in an attested deed; or any discrepancy between the handwriting of one portion and that of another in an alleged holograph will; or any apparent ground for doubting its testamentary character; or, in the case of a foreign will, any irregularity in its authentication, or in the evidence of its validity; an application may require to be made to the Court for special warrant to issue confirmation [FORMS 1, 9].

<sup>1</sup> Disbrow v. Mackintosh, 27th Nov. 1852, 15 D. 123; Frizell v. Thomson, 9th June 1860, 22 D. 1176;

Whitehead v. Thomson, 20th March 1861, 23 D. 772; Dickson on *Evidence*, 1320; Story, 897.

## CHAPTER IV.

### APPLICATIONS FOR CONFIRMATION AS EXECUTOR- NOMINATE.

THE person who in preference to all others is entitled to confirmation is the executor nominated by the deceased. CHAP. IV  
Office of  
executor-  
nominate. Originally the office of executor-nominate was a beneficial appointment and conferred upon the person nominated the right not only to administer the personal estate of the deceased, but also to appropriate the whole of the dead's part—that is, the free personal estate after paying the debts and any claims for *legitim* and *jus relictæ*. By the Act of 1617, c. 14, the interest of the executor-nominate was restricted to one-third of the dead's part, he being bound to account for the remainder to the wife and children and next of kin, according to the division observed by the law of the realm. The executor-nominate was always bound to pay the legacies out of the dead's part, and it was only the undisposed-of residue to which his claim was held to apply; and he appears to have had no claim where he was also a trustee.<sup>1</sup> The Act continued in force down to 1856, when by the Intestate Moveable Succession Act the right of the executor-nominate as such to retain any part of the estate for his own use was abolished.<sup>2</sup> An executor-nominate is now therefore, in the fullest sense, simply a testamentary trustee for behoof

<sup>1</sup> *Erskine*, 3. 9. 26; *Nasmyth v. Hare*, 17th Feb., 1819, F.C.; *Finnie v. Commrs. of Treasury*, 30th Nov. 1836, 15 Sh. 165; *Grant v. Murray*, 28th Nov. 1849, 12 D. 201, affirmed 28th June 1852, H.L. 1 Macq. 178.

<sup>2</sup> 18 Vict. c. 23, § 8, Appendix VII.

CHAP. IV. of all interested in the personal succession of the deceased.<sup>1</sup>

It is proposed in this chapter to inquire what constitutes an appointment to the office of executor-nominate, upon whom it may be conferred, and the conditions under which applications for confirmation in that character are granted.

Terms of  
appoint-  
ment.

The most common form of appointment is in these words : —“ I nominate and appoint A. B. to be my executor ;” or, in a trust disposition and settlement, where the estate has been conveyed to trustees by name, and to such person or persons as may thereafter be appointed or assumed as trustees,—“ I nominate and appoint my said trustees to be my sole executors.” It was formerly the practice in the Commissary Court of Edinburgh to confirm as executors-nominate only persons upon whom that title had been expressly conferred in the deed of nomination. In the year 1833, however, a case occurred in which the testator had in his will left an annuity to his wife, and divided his estate among his children, and then added, “ And for seeing this my will carried into effect, I hereby nominate and appoint A., B., C., and D., trustees for my wife and children.” An application for confirmation of these trustees as executors-nominate having been refused by the Commissaries in accordance with the practice above stated, the case was advocated to the Supreme Court, and the Lord Ordinary (Fullerton) reversed the decision of the Commissaries and remitted the process to them, with instructions to recall their judgment and to grant confirmation as prayed for.<sup>2</sup> Since that time it has been the practice to confirm as executor-nominate any person upon whom directly or by implication executorial powers have been conferred, although not expressly named “ executor ” by the deceased.

“ Trustees ”  
and “ exe-  
cutors.”

There is in law a clear distinction between the function of a trustee and an executor. In regularly prepared settle-

<sup>1</sup> Bell's *Principles*, 1870 ; 63 and 64 Vict. c. 55, § 2.

<sup>2</sup> Ross, 9th March 1833, not reported.

ments, the same persons are almost invariably appointed to fulfil both offices. As executors they realise the personal estate and pay the debts, and the legacies which are immediately payable, but it is only as trustees they continue to hold and manage the estate for the beneficiaries.<sup>1</sup> Where an executor is appointed under a deed containing purposes which involve his continuing to *hold* the funds realised by him as executor, he becomes a trustee in fact, whether the office has been expressly conferred on him or not.<sup>2</sup> And so where estate has been conveyed by a testator to any persons in trust for the purposes of administration and distribution after his death, their right to obtain possession of it by confirmation as executors-nominate is held to be implied, although the word "executor" has not been used in their appointment. It is chiefly in writings made by the parties themselves without professional assistance that the express appointment of executors is omitted. In such writings, indeed, the terms "executor" and "trustee" are used indiscriminately. Executors are named with instructions which clearly involve a continuing trust, and persons are named trustees, and trustees only, for purposes which are chiefly, if not entirely executorial.

Accordingly, although an appointment as trustees does not necessarily imply a nomination as executors,<sup>3</sup> testamentary trustees have been held in practice to be *ipso facto* executors-nominate, if there was nothing to show that the testator intended otherwise. Where a testator appointed a number of persons to be his trustees but only one of them to act as executor, the executor expressly appointed was alone confirmed (Ross, 23rd Jan. 1864; Scott, 28th Oct. 1882). But where a testator nominated A. B. to be his executor, and

CHAP. IV.  
"Trustees"  
and "executors."

Trustees  
executors-  
nominate.

<sup>1</sup> Jamieson v. Clark, 24th Jan. 1872, 10 M. 399; Dewar v. Urquhart, 13th June 1879, 6 R. 1026; Orr-Ewing's Trs. v. Orr-Ewing, H.L.,

24th July 1885, 13 R. 1.

<sup>2</sup> Ainslie, 8th Dec. 1886, 14 R. 209.

<sup>3</sup> Martin v. Ferguson's Trs., 16th Feb. 1892, 19 R. 474.

CHAP. IV. C. D. to be a trustee to act along with him, both were confirmed (Strachan, 27th Oct. 1873). Where the brothers of a deceased had been decerned executors-dative *qua* next of kin, and afterwards produced along with the Inventory of the estate a will by the deceased containing an appointment of trustees, the decree-dative was recalled and the trustees were confirmed as executors-nominate (Blair, 30th Jan. 1877).

Construc-  
tive ap-  
pointment.

But an executor may be appointed by conferring upon some person executorial or fiduciary powers without the use of any special terms. The Supreme Court has held that a gift to A. B., "with power to see this will executed," was a good nomination of A. B. as executor,<sup>1</sup> and that where the deceased had appointed A. B. "judicial factor to carry out the purposes of this trust" A. B. was entitled to be confirmed as executor-nominate.<sup>2</sup> But a legacy to "My executor, Mr. T.," was held an insufficient nomination in competition with the next of kin and liferenter of the residue of the estate.<sup>3</sup> In considering whether the office has been conferred, the whole scope and purport of the writing require to be taken into account. Thus a disposition in favour of A., B., and C. "for their exclusive benefit and use" was held to be simply an absolute conveyance, and the beneficiaries universal disponees (Symond, 27th April 1875). But where a husband bequeathed to his wife his whole estate "for behoof of herself and his family living," the widow was confirmed as executor-nominate, although her application was opposed by the next of kin, who were children by a previous marriage (Farquharson, 9th Oct. 1875). The following directions, when consistent with the purport of the deed, have been held by the Commissaries to import a nomination as executor,— "to use for the benefit of my family,"—"to pay all claims,"—"to

<sup>1</sup> Dundas v. Dundas, 27th Jan. 1837, 15 S. 427.

Martin v. Ferguson's Trs., *supra*.

<sup>2</sup> Tod, 25th Nov. 1890, 18 R. 152,

<sup>3</sup> Denman v. Torry, 30th May 1899, 1 F. 881.

administer," — "to carry these matters through," — "to manage anything I may leave," — "to dispose of my estate," — "to see our will faithfully and honestly carried out," — "to see to the due fulfilment of my wishes," — "to take possession and divide," — "to collect and divide," — "to carry out the instructions of this will," — "to have the entire management of my estate in every way," — "to see all my business done." In all cases where the appointment is constructive, a special warrant to issue confirmation may be required [FORM 2].

The Executors (Scotland) Act 1900<sup>1</sup> sanctioned the existing practice as regards the confirmation of testamentary trustees, and extended still further the right to confirmation as executor-nominate. It provided that where a testator has not appointed any person to act as executor, or failing the person so appointed, the testamentary trustees of such testator, original or assumed, or appointed by the Supreme Court (if any), failing whom any general donee, or universal legatee, or residuary legatee appointed by such testator shall be held to be his executor-nominate, and entitled to confirmation in that character. In applications for confirmation as executor-nominate by any general donee, or universal legatee, or residuary legatee, it must be quite clear that the applicant is, according to the whole tenor of the deceased's will, entitled to the appellation claimed, otherwise the next of kin might fall to be preferred.<sup>2</sup> It does not seem necessary, however, that the very words of the Statute should be used, if the character which these words represent is distinctly conferred. In practice since the Act came into operation, a conveyance of her "house with contents and also all moneys which (she) may possess" to her son was held to be an appointment as general donee (Wilson, 20th Oct. 1900). "I leave to (A.) all that belongs to me in money and other things," was held to be an

Benefi-  
ciaries  
executors-  
nominate.

<sup>1</sup> 63 and 64 Vict. c. 55, § 3.

<sup>2</sup> *M'Gowan v. M'Kinlay*, 4th Dec. 1835, 14 S. 105.

CHAP. IV. appointment as universal legatory (Ferguson, 28th Sept. 1900). An appointment as "sole heir and legatee without reserve or qualification" was held to have the same effect. A testator's bequest of "anything, either money or property, left" at his wife's death, to his daughters was held to entitle them to confirmation *ad non executa* as residuary legatees and as such executors-nominate (Forsyth, 10th Sept. 1900).

When there are more persons than one included in the designation founded on they are all entitled to confirmation, and each must accept or decline, or be otherwise accounted for, as if they had been expressly named executors, and where the character is conferred not on any persons by name, but on a class such as children, family, etc., the procedure will be the same as in other cases of indefinite nomination (page 63).

Substitute  
Disponees,  
etc.

Where in a will the destination in favour of a general disponent, or universal legatory, or residuary legatee, is also to his heirs in such terms as to import a substitution in their favour, and the institute dies before the testator, the estate goes to his heirs *ab intestato* and not to his testamentary executors,<sup>1</sup> though the latter have been preferred where the destination was to executors and representatives whomsoever,<sup>2</sup> and such heirs and executors are held entitled to confirmation as substitute disponees to the testator (Birrell, 29th June 1888). Though formerly an appointment as executor-dative was necessary in order that such substitutes might obtain confirmation, they would now be entitled to confirmation as executors-nominate under the Statute; but a petition for warrant to issue such confirmations may be required [FORM 3A].

Where a general disponent, or universal legatory, or residu-

<sup>1</sup> M'Laren on *Wills*, 1138; Findlay v. MacKenzie, 9th July 1875, 2 R. 909; Haldane's Trs. v. Murphy, 15 Dec. 1881, 9 R. 269; Haliburton, etc., 26th June 1884, 11 R. 979; Haldane's Trs. v. Sharp's Trs., 30th

Jan. 1890, 17 R. 385.

<sup>2</sup> Scott's Exrs. v. Methven's Exrs., 30th Jan. 1890, 17 R. 389; Buchanan's Trs. v. Whyte, H.L., 25th Feb. 1890, 17 R. 53.

ary legatee survives the testator, and the estate has become vested in him in any of these characters, but he dies unconfirmed, a double confirmation is necessary. The executor or assignee of the beneficiary must first obtain confirmation to the estate of such beneficiary, including therein his interest in the first deceased's succession, and thereafter apply to be confirmed to the first deceased as his general donee, universal legatee, or residuary legatee, by succession.<sup>1</sup> But as such beneficiaries by succession do not acquire their title, like substitute donees, etc., by appointment of the testator, but by the operation of law, they are held to be excluded from the privilege of expediting confirmation as executor-nominate, and must, as formerly, obtain in the first place decerniture as executor-dative.

An executor may be confirmed who has been appointed, not by the deceased, but by some one whom he has empowered to do so. Thus confirmation was authorised by the Commissary, and issued in favour of executors appointed in a deed of nomination executed by a beneficiary of the deceased, in virtue of a power to that effect contained in the deceased's last will and testament (Hinds, 11th March 1859). Where the deceased appointed A. B. as executor, "with power to name another if she sees fit,"—A. B. by deed of assumption appointed C. D., and both were confirmed (Parker, 10th Nov. 1881). Where the deceased had nominated A. B. to be her executor, and directed and required the said A. B. to assume along with him, as a trustee, C. D.,—A. B. was confirmed alone on producing a declination from C. D. (Miller, 17th April 1862). Where the testator, in a codicil to his trust-disposition, "wished and desired A. B. to be made a trustee," it was held that this was not an appointment, but a direction to assume, and that A. B. must be assumed unless he declined to act (Lawson,

CHAP. IV.  
Donees,  
etc., by suc-  
cession.

Executor  
named under power.

<sup>1</sup> Bell's *Principles*, 1896.

CHAP. IV. 1st April 1878). But when the deceased merely recommended her trustee to assume A. B., and they had not done so, they were confirmed alone (Roy, 4th Feb. 1863).

Trustees  
assumed or  
appointed  
by Court.

Where, under a trust-settlement, the trustees originally named therein would be entitled to confirmation as executors-nominate, any trustees whom they may assume to act along with them, or whom the Court may appoint as substitute trustees, are also held entitled to confirmation as executors-nominate. Where the deceased by a holograph will directed that trustees be appointed "to see her will executed free from responsibility," but failed to make any appointment either of trustees or executors, and on an application to the Supreme Court by the beneficiaries two trustees were, by decree dated 2nd Nov. 1889, appointed under and in terms of the will, warrant was granted by the Sheriff to issue confirmation in favour of the trustees so appointed as executors-nominate of the deceased (Lee, 7th Dec. 1889). The powers of assumption and of appointment by the Court, conferred by the Trusts Acts of 1861 and 1867,<sup>1</sup> have been held by the Supreme Court not to be limited to trustees expressly so named, but to extend to executors-nominate, where powers which can only be exercised by trustees have been conferred upon them by the deceased's settlement.<sup>2</sup> In a holograph settlement disposing of his whole estate, a testator made no express appointment of trustees, but nominated A., B., and C. to be his *joint* executors. This nomination having fallen by the declinature of one of their number, an application was made to the Supreme Court, under the Statute of 1867, for the appointment of trustees under the said settlement. The Lord Ordinary (Gifford) granted the application on 24th February 1874, and appointed trustees with the usual powers,<sup>3</sup> and confirmation was thereafter granted in their favour as executors-nominate (Fiddes, 24th Mar. 1874). A

<sup>1</sup> 24 and 25 Vict. c. 84, and 30 and 31 Vict. c. 97.

<sup>2</sup> Ainslie, 8th Dec. 1886, 14 R. 209.

<sup>3</sup> Fiddes, not reported.

testator conveyed his whole estate, heritable and moveable, to his wife in liferent, and his children in fee, and appointed his wife to be his sole executor, so long as she continued unmarried; with very full powers in the management and disposal of the whole estate. In the deed there was no direct appointment of "trustees," and no power to assume. By a deed of assumption in the statutory form the widow assumed two of the children as trustees, in whose favour, along with herself, confirmation was granted as executors-nominate (Gow, 9th Feb. 1880). In a mutual deed, A. and B., spouses, nominated the survivor, and, on the death of the survivor, their four sons, to be their executors. On A.'s death B. assumed the four sons to act along with her, and the whole were confirmed (Rutherford, 9th April, 1878). In these cases the executors were appointed not merely to realise and pay over the estate, but to hold it for the purposes of the deed.

By the Executors Act 1900,<sup>1</sup> it has now been enacted that all executors-nominate shall, unless the contrary be expressly provided in the trust deed, have the whole powers, privileges and immunities, and be subject to all the limitations and restrictions, which from time to time gratuitous trustees have, or are subject to, under the Trusts (Scotland) Acts 1861 to 1898, or any Act amending the same, and otherwise under the Statute and Common Law of Scotland. Among the powers thus conferred on executors-nominate are those of resignation, of assuming new executors, and of acting by a majority.<sup>2</sup> And any executor who has become incapable of acting by reason of physical or mental disability, or by continuous absence from the United Kingdom for six months may be removed from office.<sup>3</sup> Minutes of resignation and deeds of assumption may be executed by executors-nominate in the Forms appended to the Trusts Act 1867,<sup>4</sup> "*or to the like effect.*" Ample scope is thus given for

Executors-nominate now Trustees.

<sup>1</sup> 63 and 64 Vict. c. 55, § 2.

<sup>2</sup> 24 and 25 Vict. c. 84, § 1.

<sup>3</sup> 54 and 55 Vict. c. 44, § 8.

<sup>4</sup> 30 and 31 Vict. c. 97.

CHAP. IV. the alterations necessary to adapt these forms to the circumstances in each case, while the substantial requirements of sections 10 and 11 of the Act are complied with. It has been decided that a minute of resignation by a trustee cannot be recalled after intimation to the co-trustees even before the date fixed by the Statute for its taking effect.<sup>1</sup> Where the assuming executors are also trustees, the deed of assumption may be granted in both characters, and both offices conferred at the same time.

Trusts  
Acts  
limited to  
Scotland.

The powers conferred by the Trusts (Scotland) Act 1867 do not apply to English trusts.<sup>2</sup> Where the testator had died domiciled in England leaving a trust settlement in the Scotch form, and a new trustee had been assumed under the Trusts Acts, and applied for confirmation, the application was objected to and abandoned (Braund, 25th Feb. 1891).

Nomina-  
tion re-  
voked or  
cancelled.

A nomination as executor may be held as cancelled otherwise than by a deed containing an express revocation. A trust deed dealing with the whole estate of a testator is held to revoke all previous testamentary writings (Moncrieff, 19th March 1883);<sup>3</sup> but in so far as they are capable of standing together the earlier writings may be sustained along with a will of later date (Cox, 19th July 1893).<sup>4</sup> Where a testator in his will appointed certain parties to be his sole executors and universal legatories, and by subsequent writings withdrew the beneficial interest from all except one, while expressly confirming the will in other respects, it was held that the nomination of executors was not revoked.<sup>5</sup> But an appointment of a sole executor has been held to supersede all previous appointments (Horsburgh, 13th Jan. 1868; Wilson, 16th May 1884); and where in a holograph

<sup>1</sup> Fullarton's *Tra. v. James*, 16th Nov. 1895, 23 R. 105.

<sup>2</sup> Brockie, 10th July 1875, 2 R. 923; Carruther's *Tra.* and Allan's *Tra.*, 11th Dec. 1896, 24 R. 233.

<sup>3</sup> Sibbald's *Tra.*, 13th Jan. 1871,

9 M. 399.

<sup>4</sup> Tronsons *v. Tronsons*, 21st Nov. 1884, 12 R. 155.

<sup>5</sup> Scott *v. Peebles*, 8th July 1870, 8 M. 959.

writing the testator said: "I appoint A. B. to be my executor," confirmation was granted in favour of A. B. alone though other three executors had been appointed in testamentary writings of previous dates not expressly revoked (Alexander, 19th March 1860). A desire that a trustee's appointment be cancelled has been held equivalent to a recall (Roberts, 18th August 1870). Where the executor under a mutual settlement to which deceased was a party applied for confirmation and produced also a deed of subsequent date revoking all former wills and naming other executors, who, however, declined to accept, confirmation was granted only after the second deed had been reduced as being *ultra vires* of the testator under the mutual settlement (Banks, 18th Sept. 1888). In a similar case, but where the second deed contained no express revocation of the first, confirmation was granted to one of the executors under the first deed on finding substantial caution (Trotter, 28th July 1888). But where a husband and wife had executed a mutual settlement naming executors, and the husband, who survived, left another settlement disposing of the accumulations of his life, and naming separate executors, the latter were confirmed on the executors under the mutual settlement renouncing all claim to the accumulations (Mann, 18th Oct. 1869).<sup>1</sup>

Where an executor's name has been deleted in a deed, and the deletion is not authenticated, the difficulty has been got over by production of a declinature from the person whose appointment was in doubt (Graham, 17th June 1868), and this course is generally followed. In a holograph writing the names of three executors had been deleted and three others interlined; on renunciations being granted by the three whose names were deleted, confirmation was

Deletions,  
interlineations,  
and additions.

<sup>1</sup> See *Morris v. Anderson*, 16th June 1882, 9 R. 952; *Beattie's Trustees*, 23rd May 1884, 11 R. 846;

*Nicoll's Exrs. v. Hill*, 25th Jan. 1887, 14 R. 384.

## CHAP IV

authorised in favour of the other three (Cockburn, 5th Jan. 1872). In a disposition the testator had appointed A. and B. his trustees, and he also nominated the said A. and B. to be his executors; the names of A. and B. as trustees were found to have been deleted, but not their designations nor their appointment as executors; on the disposition the testator had written "trustees now C., D., and E.," but without date; the Commissary held that the nomination of A. and B. was not effectually revoked, and granted authority to confirm A.,—B. being dead,—along with C., D., and E. on the application of him and them (Miller, 14th June 1872). Where in a holograph writing the appointment of executor was written after the signature, objection was taken to issue the confirmation, and the executor named, who was also next of kin, expedite confirmation as executor-dative (Scott, 2nd November 1887). But where in a will partly printed and partly holograph, and also attested by two witnesses, there was inserted after the testing clause and above the signature "Sole trustee, J. W., Prestwick," also holograph, there being no other appointment of executor, confirmation was authorised in favour of J. W. as sole executor (Lockhart, 24th October 1888).<sup>1</sup>

Executors  
misnamed.

In the deed appointing executors they are frequently misnamed, or a portion of their name is omitted, or they are erroneously or insufficiently designed, or not designed at all. The procedure in such cases is regulated by the circumstances. Where the person intended to be appointed is otherwise sufficiently identified, any misdescription may be rectified by an averment in the executor's oath to the

<sup>1</sup> In regard to deletions and alterations on wills, see judgment by Lord McLaren (Ordinary) in *Patterson's Trustees v. The University of Edinburgh*, reported 9th Nov. 1888, 16 R. p. 73. See also *Morris v. Magistrates of Dundee*, 1st May 1858, 3 Macq. 134; Chap-

*man v. M'Bean's Trustees*, 10th Feb. 1860, 22 D. 745; *Brown v. Maxwell*, 21st May 1884, 11 R. 821; *Lamont v. Magistrates of Glasgow*, 10th March 1887, 14 R. 603; and *Gray's Trustees v. Dow*, 7th Nov. 1900, 3 F. 81.

inventory; but where this is not so, a special application CHAP. IV. must be made to the Court explaining the discrepancy or supplying the deficiency, and setting forth the applicant's connection with the deceased, and the grounds upon which he avers that he is the person intended to be named; and the Sheriff, if satisfied therewith, with or without a proof, grants warrant to issue the confirmation in his favour [FORMS 4, 5].

The persons intended to be executors are generally named and designed in the deed; but sometimes a testator does not name them, but describes them as members of a class, or as possessed of some character in relation to himself or some other person, as "heirs," "children," "family," etc. In these cases there must be specification, and if necessary proof, of the individuals embraced by the description, the whole of whom must be accounted for. This is always done by a petition to the Court setting forth the facts, and craving that confirmation may be issued in favour of the persons entitled thereto in terms of the appointment [FORM 3]. Where a testator appointed his wife, "her heirs, executors, and assignees," to be his executors, the wife having predeceased, her children, as her heirs *in mobilibus*, were confirmed (Lee, 30th May 1859). And where the nomination was in favour of "A. B. and heirs," and A. B. had died, leaving three children, one of whom was abroad, and his address unknown, and another declined—the third was confirmed (Reid, 20th May 1873). In a mutual settlement by husband and wife, they appointed as their executors, on the death of the survivor, "their respective next of kin." The next of kin being very numerous, and some of them abroad, one of them, with the consent of a majority of the others, was confirmed alone on his finding caution for his intromissions (Robertson, 25th Oct. 1862). In a holograph letter addressed to her sister, the deceased had written, "I request that you and your family may be executors of my

Indefinite  
nomina-  
tion.

CHAP. IV. will." Warrant was granted to confirm the eldest son of the sister, on declinatures being produced from her and all her other children (White, 24th Jan. 1871). Where "the children who should succeed" at the testator's death were appointed executors, warrant was granted to confirm those to whom the description applied (Carrick, 10th Dec. 1873); and where the terms of nomination were similar, but two of the children were abroad, warrant was granted on the application of four in this country to confirm two of the applicants (Cotton, 11th March 1875). Nominations are not uncommon where the testator appoints certain parties in succession,—for instance, his wife, and, in the event of her predeceasing him, his "children in succession, if need be, from the eldest downwards;" in this case, the wife having predeceased, warrant was granted to confirm the eldest surviving child (Bremner, 17th March 1881).

Executors  
*ex officio.*

In some cases the holders of certain specified offices are appointed executors along with other persons who are appointed by name, as, "A., B., C., and the President of the College of Surgeons and Rector of the High School *ex officio*" (Sibbald, 6th Jan. 1869); "A., B., C., and the Senior Magistrate of K. for the time being" (Nimmo, 30th Sept. 1874). A., B., and C. and the present minister of North Esk Church and the present Town Clerk and their successors in office (Hall, 3rd Jan. 1889). In other cases they are appointed alone, as "J. M., General Treasurer of the Free Church, or his successors in office" (Tharp, 27th Sept. 1878); "Treasurer of Trinity Hospital for the time being" (Skirving, 7th Jan. 1880); "Treasurer for the time being of James Gillespie's Hospital" (Rutherford, 2nd June 1883). In all such cases, however, it is only the person who is in office at the time confirmation is craved, and who gives up, or concurs in giving up, the inventory, that is confirmed, and not also his successors in office, whose right to act only emerges on the failure of their predecessors.

Where the nomination is in favour of a corporation, the corporation itself is confirmed. Thus, confirmation has been issued in favour of "The Governors of the Hospital founded by the Crafts of Edinburgh and Mary Erskine, and known by the name of the Trades Maiden Hospital," the inventory being given up and the oath made thereto by the treasurer to said governors as specially authorised by them (Scott, 12th Sept. 1854); "The Lord Provost, Magistrates, and Council of the City of Edinburgh," the inventory being given up and the oath taken by one of the bailies (Dick, 31st August 1866), and "The Governors of James Gillespie's Hospital and Free School," the inventory being given up and the oath taken by the preses (Sime, 4th Nov. 1869). "The Board of Executors of Cape Town and G. R." were confirmed as executors-nominate under the will of a person who had died domiciled in South Africa, on evidence that they had been authorised by the local Court to administer the estate (Goldie, 22nd Oct. 1877). And "The Trustees, Executors and Agency Company (Limited), Melbourne," who had obtained probate in Victoria, were confirmed to estate in Scotland, the oath being taken by an attorney appointed by them in this country (Macpherson, 15th Nov. 1888).

CHAP. IV.  
Corporations and companies.

In the case of a direct substitution by the nomination of A., whom failing B., with no specification as to what is to constitute "failure," the substitution is held to take effect whether the failure of A. arises from death, declinature, or inability to act (Morson, 18th Feb. 1864). But where a testator nominated A., whom failing, by his predeceasing him, B., it was held that B. could not be confirmed in A.'s lifetime, even though the latter declined to act and renounced his right (Steele, 15th April 1861). The nomination of a substitute executor is held not to take effect until his right to act emerges, and until then he cannot be confirmed. An application to confirm "A., whom failing B., C., and D.," was refused, and confirmation issued in favour of A. alone

Substitute executors.

CHAP. IV. (Robertson, 9th July 1863). A confirmation always proceeds on an inventory given up by the executors to be confirmed; and no executor can give up, or concur in giving up, an inventory for confirmation until he is entitled to act. Substitute executors under the Executors (Scotland) Act 1900 have already been dealt with (pp. 55, 56).

Heir of  
last-surviving trustee.

Where in a trust conveyance there is a destination, failing the trustees, to the heir of the last survivor, this is held to be the heir at law and not the heir in moveables;<sup>1</sup> and warrant has been granted to confirm him accordingly (Thomson, 28th Nov. 1874). But such a substitution can take effect only where the trust has come into operation and the trustees have acted. Where all the trustees had predeceased the testator, the appointment was held to have entirely lapsed, and an application was made to the Supreme Court for appointment of new trustees under the Trusts Acts, which application was granted and the trustees were confirmed (Roland, 21st Feb. 1883).

Conditional nomination.

Where an executor's right to act is made contingent upon some event or circumstance, such as marriage, majority, or residence in Scotland, the facts showing whether the contingency has or has not occurred must be set forth in the application for confirmation. Where the right to act has not emerged, the same principle is applied as in the case of substitute executors. No conditional nomination is given effect to unless the condition is fulfilled. Thus, a minor, who has been appointed to act only on his attaining twenty-one years of age, is not confirmed unless he has attained that age (Simpson, 18th Jan. 1877). Where the deceased in his will named his eldest son, who might be *sui juris* and resident in Great Britain at the time, the applicant for confirmation had to set forth the facts showing that he was the person upon whom the office of executor had devolved in terms of said nomination (Stewart, 8th March 1877). An executor's right

<sup>1</sup> Alexander's *Practice*, 88.

to act is frequently made conditional on his being resident in this country ; but he will not be excluded from the confirmation by merely giving a majority of the executors in this country power to act without him. Where a deceased named A. and B., but declared that either of them should be entitled to act alone when only one of them should be in Great Britain, both were confirmed subject to that declaration (Key, 11th Feb. 1880 ; Allan, 10th April 1884). And where a majority in this country was declared to be a quorum, and there were three in this country and three abroad, the whole were confirmed subject to the declaration (Menzies, 18th Dec. 1868). But where the nomination was in favour of three executors, "or any one or more of them who might be in Great Britain at the death of the testator," and one was in India, the other two were alone confirmed (Innes, 9th Feb. 1882). Where three executors were named, but two of them had the sole right to act in the first place, and the third only on the death of one of the others, the two who were entitled to act at the time were alone confirmed (Robb, 13th March 1878). Where a testator appointed his wife, but if she should not be living at the time of his death, his children, and the wife survived and died without confirming, the nomination was held to have fallen, and one of the children was appointed executor-dative (Cormack, 12th Jan. 1883); and the same result occurred where the testator appointed executors in the event of his death before reaching New Zealand, and died after landing at Dunedin (Lamont, July 1883).

Sometimes the condition attached to a nomination has the effect of limiting the period during which the executor may be entitled to act. Limited nomination. Very common appointments of this kind are those of a daughter while she remains unmarried, and of a widow, but only during her widowhood. Less frequent are appointments during the minority of children or beneficiaries. In all such cases the confirmation is granted only subject to

CHAP. IV. the limitation. A confirmation in favour of an executor *ex officio* must always be limited to the time during which he may continue to hold the office. Where a testatrix directed her trustees, whom she had appointed her executors, that in case of their number being by non-acceptance, resignation, or decease diminished to less than four, they should be bound immediately to assume such a number of trustees as should make up their number to four,—the direction was quoted in the confirmation, and the executors were confirmed subject to the condition attached to their appointment as trustees (Clark, 1st Dec. 1885). And where a testator appointed his wife and A. to be his trustees and executors, under the declaration that if his wife remarried her right to act should cease, and that thereon certain parties named should be assumed as trustees, the confirmation was limited accordingly (Mason, 23rd April 1889).

*Sine quo non.*

Where one of a number of executors is appointed a *sine quo non*, or *sine quo non* during survivance, the effect is to make it necessary that the *sine quo non* should be a party to every act of executorship. In these cases the *sine quo non* should make oath to the inventory, and the confirmation is always granted subject to the condition, as a limitation on the right to act of the other executors. A petition for warrant to issue confirmation in favour of an executor-nominate where another executor who had been appointed a *sine quo non* had declined to act was refused, and the next of kin preferred (Thomson, 21st June 1881). Where the oath is taken by one of the executors other than the *sine quo non*, the consent and concurrence of the *sine quo non* is required to the oath and craving for confirmation (Maconochie, 2nd Oct. 1885); and may be in the form of a supplementary oath appended to the principal (Govan, 8th Sept. 1886) [FORM 63].

*Joint executors.*

Unless where the contrary is expressed the office of executor-nominate enures to the acceptors and survivors, so that an appointment does not fall so long as one of those named

survives and acts.<sup>1</sup> But the effect of an appointment as joint-executors appears to be that if all do not act the nomination falls.<sup>2</sup> Where A., B., and C., were appointed joint-executors, and C. declined, the nomination was held to have lapsed (Fiddes, 24th Mar. 1874). Where a testatrix by her will appointed A. and B. "individually and jointly" to be her executors, and by a codicil appointed C. to act "in conjunction" with them or the survivor, A. and B. having both predeceased the testator, the nomination of C. was held to have fallen and confirmation in his favour was refused (Kirby, 13th June 1892). In cases of joint nomination the executors are confirmed in the same terms as those in which they are appointed (Innes, 25th Nov. 1887).

CHAP. IV.

Separate executors are sometimes named to manage different portions of an estate. This may be done by a testator making two wills, each dealing with a specified portion of his estate, and appointing a special set of executors to manage it; or it may be done in the same deed, by defining the estate to which the right to act of the respective executors shall apply. The expedient of appointing two sets of executors is generally resorted to when a testator has estate in different countries, it being obviously convenient that the executors should be persons resident in the country where the estate is to be realised. Where the whole estate in Scotland or in the United Kingdom falls to be administered by the same set of executors, the application for confirmation is in the ordinary form. But where the administration of the estate in this country is divided and apportioned, each portion must be distinguished in the inventory, and confirmation of each craved only in favour of the executors appointed to administer it; for as there can be no partial confirmation of the estate in Scotland, the whole must be included in one

Two sets of executors.

<sup>1</sup> Gordon's Trustees v. Eglinton, 17th July 1851, 13 D. 1381; Findlay and Others, 30th June 1885, 17 D.

1014; M'Laren on *Wills*, 1664.

<sup>2</sup> Stair, l. 12. 13; M'Laren on *Wills*, 1657.

**CHAP. IV. confirmation.** Where two deeds dealt each with separate branches of the same estate, and contained a distinct nomination of executors, who, with one exception, were the same in both deeds, the whole estate was given up in one inventory under different heads, and the confirmation limited the right of the executors to act to the estate specified in the inventory falling within the terms of their respective appointments (Murray, 2nd Nov. 1861 ; Muir, 26th May 1886). Where there were separate executors for England and Scotland appointed in the same deed, the estate in both countries was included in the confirmation, and the whole executors confirmed, their right to act being limited in terms of their nomination (Leslie, 2nd Dec. 1861). Where a special executor has been named to deal with one item of estate, confirmation has been granted accordingly (Torrance, 19th Feb. 1866 ; Moore, 10th April 1879). In these cases the inventory must be deponed to by two executors, one representing each branch of the estate, unless one of the executors happens to represent both. Where there are two deponents they may concur in the same deposition ; or each may depone separately to the same inventory (Brown, 7th June 1886). Where a testator left two deeds, and under the first a specific sum, "in whatever way invested," was conveyed, and executors appointed to deal with it, but on the testator's death the item was so mixed up with other investments that it could not be distinguished—the executors appointed under the second deed, to whom the whole other estate had been conveyed, and who had been named sole executors, applied to the Commissary, with consent of the executors under the first deed, for confirmation of the whole estate in their favour, and this was granted (Horsburgh, 13th Jan. 1868). A special legacy, to which the legatee had been appointed executor, was held to have lapsed by the predecease of the legatee, and confirmed by the general executor of the deceased, though it had been specially excepted in his

appointment (Cunningham, 12th March 1877). Where special executors were appointed to deal with a certain portion of the estate, and they declined to apply for confirmation, on petition with their consent the general executors were confirmed to the whole estate (Miller, 2nd March 1888). Where a testator who died domiciled in England left separate wills relating to his estate in Scotland and England respectively, with a different set of executors in each country, confirmation to the estate in Scotland was expedited by the Scotch executors, but they were required to exhibit a copy of the English will along with their inventory (Simpson, 20th Sept. 1887). And in a similar case, except that the executors under both wills were the same persons, the whole documents were proved in England, but the Scotch estate not being included in the Probate, an inventory thereof was given up in Scotland, and the Probate recorded therewith (Scarlett, 23rd Oct. 1888).

Married women who have been named executors may give up inventory and crave confirmation without being required to set forth the consent of their husbands. Where they have been nominated executors exclusive of the husband's *jus mariti* and right of administration, the qualification is inserted in the clause of the confirmation narrating the appointment, but not in that conferring power to uplift and discharge (Higgins, 23rd Dec. 1868), it being considered doubtful how far such a qualification is applicable in a fiduciary appointment.<sup>1</sup>

Where minors have been nominated executors without any suspension of their right to act while in minority, they may be confirmed on their own application, or on the application of their curators (Houston, 21st Sept. 1865); and where a testator had nominated his pupil son to be his executor, and in another deed appointed tutors and curators to him, the

<sup>1</sup> In regard to the liability of the husband where he does consent, see *Pattison v. M'Vicar*, 5th Feb. 1886, 13 R. p. 550.

CHAP. IV. **Minors and pupils.** pupil was confirmed on an inventory being given up and confirmation craved in his favour by his tutors (Bell, 22nd Nov. 1859). Where the sole executor and residuary legatee was a minor aged nineteen, warrant was granted to issue confirmation in her favour along with her father as her administrator-in-law (Cunningham, 18th Nov. 1885). In a small estate case confirmation was issued in favour of three executors-nominate, two of whom were in minority, the ages being specified in the oath to inventory and in the confirmation (Hardie, 20th Dec. 1888). And where in a will two minors and a pupil were named sole executors, and were also universal legatories, and one of the minors deponed to the inventory and craved confirmation in favour of the three, with consent and concurrence of their father as their administrator-in-law, confirmation was granted as craved (M'Donald, 2nd Jan. 1890). Though confirmations in favour of minors and pupils are competent, they are, from their obvious inconvenience, not common, as such executors can only discharge their duties through their legal guardians. Where a pupil was nominated along with a number of other executors, four of whom accepted, and a declinature by the pupil was produced, the Commissary held that the pupil was unable personally to accept or decline, and could only do so through a curator or factor; but on the ground that there was a sufficient number of accepting executors to administer the estate, and that the exclusion of the pupil would facilitate its administration, while his own interest was not exposed to any risk, did not insist on the appointment of a factor, "whose duty it would so obviously be, on behalf of the pupil, to decline to act," and authorised confirmation in favour of the other accepting executors (Beattie, 25th Nov. 1872). And on similar grounds, where the deceased had nominated his wife and child, the latter being a pupil, confirmation was authorised in favour of the widow (Stewart, 9th Aug. 1880). A

declinature by a minor has been accepted (Moore, 15th March 1881). CHAP. IV.

Where a person who had been appointed executor-nominate had become insane, it was held competent to issue confirmation in his favour on an inventory given up by his *curator bonis* (Lumsdaine, 21st April 1868 ; Pattison, 17th Nov. 1871). In both these cases the person named was the sole executor, and had a liferent interest in the estate. And where the executor was also universal legatory, she was confirmed on the application of her *curator bonis* (Peterson, 3rd Oct. 1884). And where a sole executor had expedite confirmation, and afterwards became insane, an eik to the confirmation was expedite in the executor's name on the application of her curator (Mailer, 1st Nov. 1888). Executors under curatory.

It is no objection to the confirmation of an executor that he is resident abroad. Though all the executors are out of the country, the oath may be taken by one of them, and confirmation issued in the usual way. But when all the executors are abroad, it is usual for them to grant a factory or power of attorney in favour of some person in this country, authorising him to give up inventory, make oath thereto, and expedite confirmation in their names. If it is desired that the factor or attorney should also proceed to realise the estate, powers to that effect are added. But it is the executors that are confirmed, and not the factor or attorney [FORM 72]. Executors abroad.

Confirmation has always been issued in favour of the whole surviving executors-nominate of the deceased, unless they renounce or decline to act.<sup>1</sup> The declinature may be in the form of a minute or statement written on the deed, a letter, or an excerpt from minutes of a meeting at which the declining executor was present and setting forth the fact of his declinature. Where an executor is unable to write from want of education or other cause, a declaration made personally to the Executors must act or renounce.

<sup>1</sup> Balfour's *Practicks*, anent Executors.

CHAP. IV. Clerk of Court has been accepted. Where a trustee and executor has accepted, but has resigned before confirmation is applied for, a certified copy of his resignation must be produced. Resignation as a trustee implies resignation also as an executor unless where otherwise expressly declared ;<sup>1</sup> and it is not held to be any bar to the issue of confirmation in favour of the accepting and continuing executors that the period within which it is provided by the Statute that such resignation shall take effect has not expired. Resignation cannot be revoked though not taking effect till a subsequent date.<sup>2</sup> What is wanted in all cases is evidence that the person named has had intimation of his appointment, and declines to be confirmed. Where four executors were named and two applied for confirmation, and deponed that the other two had declined to act, a minute of a meeting at which all four were present, and at which the applicants had been authorised to obtain confirmation in their own favour, was accepted as evidence of declinature (Menzies, 3rd Jan. 1861) ; and an application by three executors for warrant to issue confirmation in favour of one of them, the other two declining to accept "in the meantime," was granted, nothing however being decided or reserved as to any subsequent application for confirmation by the non-acceptors, and no such application was made (Mathison, 2nd April 1867). Where a relict had obtained decerniture as executrix-dative, and in giving up the inventory produced a deed naming three executors, two of whom had declined, and the third was unaccounted for, the Commissary refused to authorise confirmation without intimation to the latter, and a declinature was obtained (Wright, 28th Jan. 1867). Where, however, a judicial factor has been appointed under a trust-deed, he is confirmed without being required to produce declinatures, it being presumed that the Supreme Court has been satisfied

Resignation.

Declinature.

<sup>1</sup> 30 and 31 Vict. c. 97, §§ 18, 10.

<sup>2</sup> Fullarton's Trs. v. James, 16th Nov. 1895, 23 R. 105.

as to the failure of the trustees before making the appointment (March, 28th July 1869). Where a trustee and executor accepted as trustee, but declined to act as executor, the declinature was received as sufficient (Baird, 30th Oct. 1883). A *curator bonis* may decline for his ward (Macara, 17th Dec. 1885). Where one of three executors named declined, but withdrew his declinature before anything had been done, he was confirmed along with the others (M'Queen, 22rd April 1890).

Where a person who has been named an executor is, from old age and infirmity, or from mental or bodily incapacity, unable to act or to grant a declinature, a medical certificate of such inability must be produced. Where an executor named has changed his residence, or gone abroad, and his address cannot be ascertained, authority may be granted to issue confirmation in favour of the other executors named by the deceased. But where the absent executor has an interest in the succession, confirmation may be authorised only on caution being found to the extent of such interest (Purvis, 9th July 1863; Templeton, 10th March 1866). Even where the residence of an executor abroad is known, if it can be shown that the delay necessary to communicate with him, in order to ascertain his acceptance or declinature, would be injurious to the estate, and especially if he has no interest, and it is considered probable that he will decline, and if there is a clear majority without him, the Sheriff may grant warrant to confirm the others in this country without waiting for his declinature. But where there were only two executors named, the Sheriff refused to confirm one who was in this country without a declinature from the other, who was in Madeira (Norton, 17th October 1876) [FORMS 6, 7].

In England, and in countries subject to English law, it is the practice to grant probate to one or more of the executors named by the deceased, without notice to the others, power

CHAP. IV.

Acceptance or declinature not obtained.

Power to confirm not reserved.

CHAP. IV. being reserved to make a like grant to the other executors when they shall apply for the same; the new grant, if applied for and issued, being termed a double probate.<sup>1</sup> There is no such thing known in Scotland as a double confirmation; that is, a second confirmation of the same estate granted in favour of a different executor while the first is extant; and no power to grant such a title has ever been reserved. A petition was presented by four accepting executors for warrant to issue confirmation in their favour, reserving power to two others who had not yet declared whether or not they would accept, "to apply for confirmation, and to be conjoined in the executorship" with the petitioners on their accepting. Intimation of the petition having been ordered to the non-accepting executors, they personally accepted service, but did not enter appearance; and the Commissary Depute granted warrant to issue confirmation "without the reservation prayed for," as not being in conformity with the invariable practice of the Court. The petitioners appealed to the Commissary. Counsel for the petitioners having explained that what was craved was merely that the non-accepting executors should not be barred from making application for confirmation afterwards if they thought fit, the Commissary recalled the interlocutor appealed against, and granted the prayer of the petition, on the ground that the reservation seemed of no importance, as the non-accepting executors would have the right to *apply* whether it was made or not, and that nothing was decided as to the competency of granting such an application (Stevenson, 16th May 1867). No application under this reservation was ever made.

English  
executors.

Where an application for confirmation is made by executors under an English will who have obtained probate in the Court of the deceased's domicile, it is the practice to grant the application without requiring declinaturs from any

<sup>1</sup> Williams on *Executors*, 320.

others in whose favour the power to make a like grant may have been reserved, though, of course, the whole executors named who have not renounced may be confirmed if they choose to apply. Even where probate has not been obtained, it is not the practice to insist on declinatures, if it can be shown that the law of the deceased's domicile would authorise the issue of probate to the executor *primo veniente*. On this ground, where probate had been obtained in Australia in favour of one executor, and the Court had reserved power to make a like grant to another resident in this country, the latter applied for and obtained confirmation in this country in his favour alone (Keillor, 6th Jan. 1883 ; Messer, 30th May 1890).

CHAP. IV.

In like manner, where a foreign will founded on contains an appointment of executors, confirmation as executors-nominate is granted in their favour, or of such of them as have obtained or would be entitled to apply for and obtain probate, or other similar administrative title, in the Courts of the deceased's domicile. Wills coming from countries where executors are not required very seldom contain any appointment of executors, although in some cases it may have been inserted with the view to the administration of estate in this country. Where such an appointment does occur, it will be given effect to ; but where there is no such appointment, the beneficiaries under the will are regarded here simply as legatees or disponees, and must obtain decerniture as executors-dative in whatever beneficial character or designation may be conferred upon them by the will, before they can apply for confirmation (Leslie, 27th August 1863 ; Guy, 2nd Feb. 1874). Under a French will, however, where the testator simply appointed her niece to be "legataire universelle," warrant was granted to issue confirmation in her favour on a certificate by a French notary that by the law of France she was entitled to the administration of the estate without surety or caution, and without being subject to the

Foreign  
executors.

CHAP. IV. supervision of any Court (D'Abbadie, 24th July 1901).  
 — And where the deceased, who died in Edinburgh, domiciled in Germany, by his will provided that his wife should have the sole management of the estate during her widowhood, and evidence was produced that such an appointment according to the law of the domicile would confer upon the widow the sole administration provided she obtained the consent of a guardian for the children of the deceased appointed by a German Court, such consent was obtained, and the widow was confirmed as executor-nominate (Wagner, 19th May 1886). By the law of France testamentary executors have no right to act for recovering the funds of the succession, unless powers to do so have been expressly granted by the testator. Where such powers have not been granted a judicial administrator has been appointed by the French Courts, and afterwards decerned and confirmed as executor-dative (De la Lastra, 12th July 1889 ; Delondre, 25th March 1898).

Executor-  
ship in  
England.

It is a peculiarity of the law of England, as distinguished from that of Scotland, that the office of executor transmits to the executor of a sole executor, or of a last surviving executor who has obtained probate.<sup>1</sup> Executors, therefore, in proving a deceased's will, become *ipso facto* executors of all estates of which the deceased who nominated them was the sole or last surviving executor. In this way the chain of executorship may be continued *ad infinitum*,<sup>2</sup> unless broken by intestacy or failure to take probate. This rule applies only to executors-nominate. There are, indeed, no other executors in England, what we call executors-dative being known in England only as administrators. Effect has frequently been given to this peculiarity of English law in granting confirmation to personal estate forming part of an English succession, where the executors in England have died after probate without confirming to the Scotch estate.

<sup>1</sup> Williams on *Executors*, 204.

<sup>2</sup> Tristram and Coote, 49-53.

The person who, according to the rule referred to, is entitled to continue the executorship has obtained confirmation in the same manner as if he were an assumed or substitute executor (Murray, 27th Oct. 1852 ; Oddie, etc., 2nd Aug. 1873). And where the deceased died domiciled in Canada, warrant was granted to issue confirmation *ad non executa* of the estate in Scotland in favour of the executor of an executor who had died after being confirmed, but before uplifting the estate, in terms of the Canadian will, and in accordance with Canadian law (Bethune, 18th Feb. 1886). The executors of the last surviving executor were also confirmed where the deceased had died domiciled in the Colony of Victoria (M'Allan, 27th Oct. 1887).

## CHAPTER V.

### APPLICATIONS FOR CONFIRMATION AS EXECUTOR-DATIVE.

**CHAP. V.** IN cases of intestate succession confirmation was formerly necessary, not only as an active title to recover the estate, but to vest the succession in the next of kin. There was no representation in moveables, unless the succession was confirmed. If the next of kin died before confirmation, he lost his right to the estate in so far as not actually reduced into possession, and the whole went to those who were next of kin at the date of confirmation. Thus where two children survived their father, and the one died leaving issue, before confirmation, the other claimed the whole estate, and the issue got nothing.<sup>1</sup> But by an Act passed on 19th July 1823, it was enacted that thereafter in all cases of intestate succession, where any person or persons who, at the period of the death of the intestate, being next of kin, should die before confirmation was expedite, the right of such next of kin should transmit to his or her representatives, so that confirmation might and should be granted to such representatives in the same manner as confirmation might have been granted to such next of kin immediately upon the death of such intestate.<sup>2</sup> The effect of this enactment was held to be that the beneficial interest in the succession vested in those who were next of kin at the date of the death, and not, as previously, in those who were next of kin at the date of the

<sup>1</sup> Erskine, 3. 9. 30.

<sup>2</sup> 4 Geo. iv. c. 98, § 1, Appendix of Statutes v.

confirmation.<sup>1</sup> It was also decided that its provisions did not apply to any next of kin who died before the passing of the Act,<sup>2</sup> but that it did apply to every next of kin who died after that date, even though the intestate whose estate fell to be confirmed had died before it.<sup>3</sup> The office of executor-dative therefore continued to be a beneficial appointment, to the extent of the executor's interest in the succession. But whereas formerly the beneficial interest of the executor-dative in many cases depended not only on his relationship or propinquity to the deceased, but upon his having obtained confirmation in virtue thereof, it now depends on the former alone, and he obtains confirmation not so much on the ground of kinship as on that of the beneficial interest which it confers. Propinquity alone, apart from interest, may still be admitted as a competent title.<sup>4</sup> Where the deceased has left heritage as well as moveables, and the heir in heritage is also one of the next of kin, he may be confirmed as executor without being thereby bound to collate,<sup>5</sup> and the other next of kin cannot prevent his being conjoined with them in the office of executor if he chooses to apply for it (Dennell, 7th May 1888). It has also been held that, on the death of the whole next of kin of a person deceased, his nearest surviving kindred at the time the office is applied for are, in the absence of competition, entitled to the office of executor, and that it is no objection to their being decerned that they have no beneficial interest in the executry estate<sup>6</sup> (Warrender, 11th Jan. 1884). But that is only when there is no competition for the office. The recent practice of the

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Executors-  
dative.

<sup>1</sup> Mann v. Thomas, 9th Feb. 1830, 8 S. 468; Frith v. Buchanan, 3rd March 1837, 15 S. 729; Elder v. Watson, 2nd July 1859, 21 D. 1122.

<sup>2</sup> Greig v. Malcolm, 5th March 1835, 13 S. 607.

<sup>3</sup> Cunningham v. Farie, 15th Jan.

1856, 12 D. 312.

<sup>4</sup> M'Gowan v. M'Kinlay, 4th Dec. 1835, 14 S. 105.

<sup>5</sup> Mitchell v. Macmichan, 13th Jan. 1852, 14 D. 318.

<sup>6</sup> Bones v. Morrison, 21st Dec. 1866, 5 M. 240.

CHAP. V. Commissary Courts proceeds on a disregard of mere proximity in blood as a title to the office of executor, whenever it is brought into competition with a person having a beneficial interest in the succession.<sup>1</sup>

Executors-dative.

An appointment as executor-dative is necessary not only in cases of intestacy but also where all persons who may be entitled to confirmation as executors-nominate have died or declined to act or become incapable of acting, or where no such persons have been appointed. In these circumstances any person having right to a share of the deceased's personal estate may apply by petition to the Sheriff for decerniture as executor-dative.

Who are entitled to the office.

In case of competition for the office, applicants are preferred in a certain order ; but any one who is directly entitled to share in the succession may be appointed without special intimation to other persons having an equal or even a preferable claim to the office. All applicants having the same or an equal right in the order of preference, are entitled to be conjoined ; and any number of applicants, irrespective of the order of preference, may be conjoined of consent.<sup>2</sup>

Order of preference.

Among the "Orders to be observed in the Confirmation of all Testaments," forming part of the Instructions to the Commissaries, issued in 1666 by the archbishops and bishops, with the authority of the Supreme Court, are the following :—"If there be no nomination or testament made by the defunct, or if the testament-testamentar shall not be desired to be confirmed, ye shall confirm the nearest of kin desiring to be confirmed, and if the nearest of kin shall not desire to be confirmed, ye shall confirm such of the creditors as desire to be confirmed as creditors, they instructing their debts ; and if neither nearest of kin, executor, or creditor shall desire to be confirmed, ye shall confirm the legators,

<sup>1</sup> *M'Pherson v. M'Pherson*, 7th Shires, 25th Oct. 1878, 6 R. 102. Feb. 1855, 17 D. 358 ; *Webster v.*

<sup>2</sup> *Muir*, 3rd Nov. 1876, 4 R. 74.

such of them as desire to be confirmed, and instruct that they are legators; and if no person having interest foresaid shall confirm, ye shall confirm your procurator-fiscal, datives always being duly given thereto before; and if after the said datives (but before confirmation), any person having interest shall desire to be surrogat in place of the procurator-fiscal, ye shall confirm them as executors surrogate in place of the procurator-fiscal."<sup>1</sup> It will be observed that in this enumeration there is no reference to the relict; but previous to the date of these Instructions the relict had been held entitled to the office of executor-dative as a creditor in respect of her *jus relictæ*.<sup>2</sup> According to the older practice, the general dispositive, if he was not also nominated executor, was not entitled to be decerned executor-dative if either next of kin, widow, or creditor appeared to oppose him; but it was at length decided that he should be preferred to the office before any person not named by the deceased, on the ground that those to whom the deceased had given the only substantial interest in his succession ought also to have the right of administering if he has not expressly excluded them.<sup>3</sup> The order of preference then stood thus—first, the general dispositive; second, the next of kin; third, the widow; fourth, creditors; and last of all, special legatees.<sup>4</sup> This order is still maintained, though the character or title in respect of which the office of executor may now be claimed has been greatly extended, and certain statutory beneficiaries are held to rank along with or immediately after the next of kin. General dispositives, universal legatories and residuary legatees appointed by the testator being now entitled to confirmation as executors-nominate, only those who have become vested with these titles *by succession* require to be decerned executors-dative (pp. 56, 57) [FORM 13].

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Order of  
preference.

Benefici-  
aries by  
succession.

<sup>1</sup> Acts of Sederunt, 1553 to 1790, Dict. 3818.  
p. 95.

<sup>2</sup> Mor. Dict. *voce* Executor, 3843.

<sup>3</sup> Crawford, 19th Jan. 1755, Mor.

<sup>4</sup> Erskine, 3. 9. 32; Bell's *Commentaries*, ii. 78 (7 ed.).

## CHAP. V.

Next of kin.

The term "next of kin" in questions of intestate succession does not necessarily mean those who are nearest in blood to the deceased, but is used to denote those relations in their order, who, by the common law of Scotland, are entitled to succeed to his personal estate. The order in which relations succeed to the personal estate of a deceased person is the following :—*First*, Children and their descendants in their order. *Second*, Brothers and sisters of the full blood (german), that is, by the same father and mother, and their descendants in their order. *Third*, Brothers and sisters of the half blood (consanguinean), that is by the same father, but by different mothers, and their descendants in their order. There is in Scotland no succession through the mother, so that brothers and sisters by the same mother, but by different fathers (uterine), are not in law kin to each other at all, and the mother herself can never succeed to her child as next of kin.<sup>1</sup> *Fourth*, The father. Thus the father is next of kin to his child only when the child has left no issue, and no brothers or sisters, german or consanguinean, or their descendants. *Fifth*, The brothers and sisters of the father of the full blood (german), and their descendants in their order. *Sixth*, The brothers and sisters of the father of the half-blood (consanguinean), and their descendants in their order. *Seventh*, The grandfather, whom failing, his collaterals in same order as those of the father<sup>2</sup> [FORMS 14–25].

Representatives of next of kin.

Representatives of the next of kin under the Act of 19th July 1823,<sup>3</sup> are entitled to be confirmed in the same order of preference as the next of kin themselves. Although the beneficial right conferred by this Statute was held to vest in the next of kin immediately on the death of the intestate, so as to be at once transmissible to his representatives by assignation or

<sup>1</sup> Honeyman's Trs. v. Donaldson, 30th Jan. 1900, 2 F. 539.

<sup>2</sup> M'Laren on *Wills*, 222-25.

<sup>3</sup> 4 Geo. IV. c. 98, § 1, App. v.

arrestment—the right to confirmation as an active title to intromit with the estate is not held to transmit until after the death of the next of kin. It has been laid down that the term “representative” must be “very liberally construed, and in a legal sense may include those who take by deed as well as by intestate succession.”<sup>1</sup> Accordingly, the term has been held to include all in whom any claim on the personal estate of the next of kin has become vested either by deed or by the operation of law, and that without any title having been established by confirmation to represent the immediate beneficiary as is necessary in testate succession. The privilege conferred by the Statute has also been held applicable not only to the immediate representatives of the next of kin, but to those whose claim arises by transmission. Thus, where the next of kin was a married woman, and the beneficial interest had vested *jure mariti* in her husband, who predeceased her, a brother of the husband and one of his next of kin, was, on the death of the wife unconfirmed, decerned as her representative on her ancestor’s estate, without having made up any intermediate title to his deceased brother (Bremner, 2nd Feb. 1883).<sup>2</sup> But this right to obtain a direct title *per saltum* does not preclude any claim on the part of the revenue for duties on the intermediate successions [FORM 26].

By the Intestate Moveable Succession Act 1855,<sup>3</sup> it was enacted that where any person dying intestate should predecease his father without leaving issue, his father should have right to one-half of his moveable estate in preference to any brothers or sisters or their descendants who might have survived such intestate (§ 3). In practice, the beneficial

Father and  
his repre-  
sentatives.

<sup>1</sup> Mann v. Thomas, 9th Feb. 1830, 8 S. 468; Frith v. Buchanan, 3rd March 1837, 15 S. 729.

<sup>2</sup> It is otherwise in England, where representation must be established by administration being taken

successively to each of the intermediate beneficiaries.—Lewin on Trusts, 548–49; Walker’s Compendium, 41.

<sup>3</sup> 18 Vict. c. 23, Appendix VII.

CHAP. V. interest thus conferred upon the father has been held to entitle him to the office of executor-dative, and this practice has received the sanction of the Supreme Court.<sup>1</sup> And it was at the same time decided that not the father himself only, but in the event of his death before confirmation his representatives, had the right to be conjoined along with the next of kin in the office of executor-dative. This decision fixes the place of the father and his representatives in the order of preference, when claiming under this Statute, *pari passu* with the next of kin and their representatives. Of course where there is no issue and there are no brothers or sisters, or their descendants, the father will have the sole right to the office as the only next of kin [FORM 32].

Mother and  
her repre-  
sentatives.

By the same Statute it is enacted that where an intestate dying without leaving issue, whose father has predeceased him, shall be survived by his mother, she shall have right to one-third of his moveable estate in preference to his brothers and sisters or their descendants, or other next of kin of such intestate (§ 4). The beneficial interest thus conferred upon the mother has been held to entitle her also to the office of executive-dative, and the practice on this point likewise has been sanctioned by the Supreme Court.<sup>2</sup> In the case in which this question was decided, there was no competition. The relict had also applied for the office, and of consent was conjoined with the mother. An opinion was indicated that in the event of a competition with the next of kin, the latter might fall to be preferred. But looking to the grounds of judgment in the subsequent case of *Webster*, above referred to, the probability appears to be that, in virtue of the beneficial interest conferred upon her, the mother and her representatives would be held entitled to rank along with the next of kin in the order of preference [FORM 33].

By the same Statute it is enacted that where an intestate

<sup>1</sup> *Webster v. Shiress*, 25th Oct. 1878, 6 R. 102.

<sup>2</sup> *Muir*, 3rd Nov. 1876, 4 R. 74.

dying without leaving issue, whose father and mother have both predeceased him, shall not leave any brother or sister german or consanguinean, nor any descendant of a brother or sister german or consanguinean ; but shall leave brothers and sisters uterine, or a brother or sister uterine, or any descendant of a brother or sister uterine, such brothers and sisters uterine and such descendants in place of their predeceasing parent shall have right to one-half of his moveable estate (§ 5). In virtue of the beneficial interest thus conferred, brothers and sisters uterine have been decerned executors-dative. In a competition it seems not improbable that they might be held, on the ground of their interest, to rank along with the next of kin [FORM 34].

CHAP. V.  
Brothers  
and sisters  
uterine.

By the same Statute it is enacted that in all cases of intestate moveable succession in Scotland accruing after the passing of the Act, where any person who, had he survived the intestate, would have been among his next of kin, shall have predeceased such intestate, the lawful child or children of such person so predeceasing shall come in the place of such person, and the issue of any such child or children, or of any descendant of such child or children, who may in like manner have predeceased the intestate, shall come in the place of his or their parent predeceasing, and shall respectively have right to the share of the moveable estate of the intestate to which the parent of such child or children, or of such issue, if he had survived the intestate, would have been entitled : provided always, that no representation shall be admitted among collaterals after brothers' and sisters' descendants, and that the surviving next of kin of the intestate, claiming the office of executor, shall have exclusive right thereto, in preference to the children or other descendants of any predeceasing next of kin, but that such children or descendants shall be entitled to confirmation when no next of kin shall compete for said office (§ 1) [FORM 35]. It is not clear whether children of a predeceasing next of kin,

Children of  
predeceasing  
next of  
kin.

CHAP. V. although postponed to the next of kin themselves in the order of preference to the office of executor, are also postponed to those whom it has been decided the Statute intended to put on the same level as the next of kin; for example, whether a father, while himself ranking with the surviving brothers and sisters of an intestate, in his claim to the office of executor, would also be entitled to exercise the right which the Statute confers upon them of excluding the children of a predeceasing brother or sister from the office.

Represent-  
ation  
limited.

The right to representation conferred by this section of the Statute, though it extends indefinitely in the direct line is not admitted among collaterals "after brothers' and sisters' descendants." It has been decided that the brothers and sisters meant by the Statute are the brothers and sisters of the intestate.<sup>1</sup> If the intestate leaves a brother or sister, and leaves also nephews and nieces by a predeceasing brother or sister, such nephews and nieces will take their parents' share; and if the next of kin are nephews and nieces, and there are also children of predeceasing nephews and nieces, such children will take the share of their predeceasing parent, and will be entitled to confirmation as children of predeceasing next of kin if the surviving next of kin do not compete. But where the next of kin were cousins-german, descendants of predeceasing cousins were held to be excluded from the succession, and would of course be also excluded from the office of executor-dative.

Predeceas-  
ing next of  
kin.

The character of "predeceasing next of kin" applies only where some other person in the same degree of relationship has survived the intestate. Thus if A. is predeceased by a brother, and survived by a sister, the brother would be a predeceasing next of kin; but if both brother and sister, though next of kin to A. while alive, predeceased him, they would not be predeceasing next of kin in the sense of the Statute; and their children would take A.'s estate not *per*

<sup>1</sup> *Ormiston v. Broad*, 11th Nov. 1862, 1 M. 10.

*stirpes* and as children of predeceasing next of kin, but CHAP. V. directly and *per capita* as themselves the next of kin to A. at his death.<sup>1</sup>

By the 9th section of the Statute it is declared that the words "intestate succession" shall mean and include suc- Partial intestacy. cession in cases of partial as well as of total intestacy; and that "intestate" shall mean and include every person deceased who has left undisposed-of by will the whole or any portion of the moveable estate on which he might, if not subject to incapacity, have tested. Even where the deceased, therefore, has left a settlement or will of some kind, if there is any portion of his personal estate undisposed of by it, the provisions of this Act will take effect, and the persons whom it may entitle to share in the intestate estate will be entitled also in their order to the office of executor.

In regard to the character in which persons claiming the office of executor under the Statute should be decerned, Statutory beneficiaries. opinions have sometimes been indicated not altogether adverse to the contention that the appellation "next of kin" must now be considered applicable to those upon whom a right of succession to moveable estate has been conferred by Statute, as well as to those who succeed by common law. But it has been pointed out that in the Statute itself the term "next of kin" is expressly maintained in its distinctive sense, and observed that "persons called to a share of the succession by the Statute are not thereby made next of kin," and that "the term next of kin has never been used in the sense of including those who by Statute are admitted to a share in the succession."<sup>2</sup> The practice in the Commissariat of Edinburgh has always been to decern beneficiaries under the Statute in the character in which they succeeded—*qua* father, *qua* mother, *qua* brother uterine, *qua* child of a pre-

<sup>1</sup> Turner and Others, 27th Nov. 1869, 8 M. 222. tees v. Janes, 10th Dec. 1880, 8 R. 242.

<sup>2</sup> Lord President in Young's Trus-

CHAP. V. deceasing next of kin, etc. : not *qua* next of kin in any case.

Where the mother had applied to be decerned *qua* next of kin, it was held she was not entitled to the office in that character.<sup>1</sup> But the daughter of a predeceasing brother of an intestate, and as such entitled along with her surviving uncle to a share of the intestate's moveable succession, having been without opposition confirmed as executor-dative *qua* next of kin, in a reduction of the decree subsequently brought by her uncle, it was held that though the character of next of kin did not in strictness belong to the niece, the mis-description was not such as to nullify her confirmation, and reduction thereof was refused.<sup>2</sup>

Relict.

By the common law husband and wife did not share in each other's personal succession. On the death of either, if there were no children, the common property of the spouses forming the goods in communion, and which was held by the husband during the subsistence of the marriage as his own personal estate, fell to be divided equally between the survivor and the representatives of the predeceaser. If there were children of the marriage, one-third only went to the representatives of the predeceaser. Thus, on the death of the husband, one-half or, as the case might be, one-third of the goods in communion fell to the widow as *jus relictæ*. Confirmation was not necessary to vest this right, as it was necessary to vest the succession in the next of kin ; but where the next of kin did not apply for confirmation, the widow was entitled to it as an active title to recover her *jus relictæ*. In no case, if husband died intestate, did she take any share in his free personal succession, which went entirely to his next of kin. The widow was thus not an heir but a creditor, and in the earlier cases was expressly discerned *qua* creditrix, and it was on this ground that while ranking before ordinary creditors her right to the office was, and

<sup>1</sup> Muir, 3rd Nov. 1876, 4 R. 74.

<sup>2</sup> Dowie v. Barclay, 18th March 1871, 9 M. 726.

still is, held to be postponed to that of the next of kin<sup>1</sup> CHAP. V.  
[FORM 27].

On the predecease of the wife, her next of kin had right Husband. to confirm, and to claim from the husband her share of the goods in communion. This right was abolished by the Moveable Succession Act 1855;<sup>2</sup> but any separate estate owned by her exclusive of her husband's *jus mariti*, and not, therefore, forming part of the goods in communion, still fell, on her death, not to her husband, but to her own next of kin or other legal personal representatives. Consequently, as the husband could have no interest in his wife's succession, it was held incompetent to decern him as her executor-dative. But by the Married Women's Property Act of 18th July 1881,<sup>3</sup> it was enacted that thereafter the husband of any woman who might die domiciled in Scotland should take, by operation of law, the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate, according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case might be.<sup>4</sup> It has been decided that this section of the Act confers on the husband a beneficial interest in his wife's succession, and that it applies whether the marriage was before or subsequent to the date of the Act.<sup>5</sup> Accordingly the husband, since the passing of the Act, has been decerned *qua* husband, in the same manner as the widow has been in use to be decerned *qua* relict [FORM 27].

<sup>1</sup> *Laird of Dundaff v. Laird of Craigie*, 13th March 1612; *Mor. Dict.* 3843; *Inglis v. Inglis*, 28th Jan. 1869, 7 M. 435.

<sup>2</sup> 18 Vict. c. 23, § 6, App. VII.

<sup>3</sup> 44 and 45 Vict. c. 21, § 6.

<sup>4</sup> *Simon's Trustees v. Neilson*, 20th Nov. 1890, 18 R. 135; *Buntine*

*v. Buntine's Trustees*, 16th Mar. 1894, 21 R. 714.

<sup>5</sup> *Poe v. Adamson*, 13th Dec. 1882, 10 R. 356; affirmed H.L., 16th July 1883, 10 R. 73. *Fotheringham's Trustees v. Fotheringham*, 27th June 1889, 16 R. 873.

## CHAP. V.

Married  
Women's  
Property.

In regard to marriages contracted after the date of the last-mentioned Statute, 18th July 1881, the community of goods as between husband and wife no longer exists.<sup>1</sup> The personal estate of each remains entirely separate. On the death of the husband, the wife, instead of one-third of the common property of the spouses, now retains the whole of her own estate, and gets one-half, or, where there are children, one-third of her husband's. On the death of the wife the husband, instead of the whole of the common property of the spouses, retains only his own estate, and gets one-half, or, where there are children, one-third of his wife's. The interest of either of the surviving spouses in the estate of the predeceaser is now in both cases the same, and is substantially a right of succession, under certain limitations, to the extent of one-half, or, where there are children, one-third of the personal estate. That being so, the question was raised in several Commissariots,<sup>2</sup> whether on this ground, and also in respect of the extent of their interest in the succession, the relict or surviving husband might not now be entitled to be conjoined with the next of kin as well as the father and other statutory beneficiaries, in the office of executor-dative. But in all cases, conjunction was refused, and the Supreme Court has decided, on appeal, that the husband has no higher right under the Statute than the relict had under the common law.<sup>3</sup> Husband and wife, therefore, being still only creditors, may fall to be postponed, not only to the next of kin, but also to those who by Statute are made heirs.

## Creditors.

Next to the relict or husband any ordinary creditor of the deceased is entitled to be decerned and confirmed as executor-dative *qua* creditor. He must produce as his title a liquid ground of debt, such as a bond or bill by the defunct, or the extract of a decree by a competent Court against him. A

<sup>1</sup> Trayner's *Latin Maxims and Phrases*, "*Communio bonorum*." 302, iv. 129.

<sup>2</sup> In Ayr, Banff, Forfar, and Lanark; *Sheriff Court Reports*, iii. <sup>3</sup> *Stewart v. Kerr*, 19th Mar. 1890, S.L.R. 27. 561; *Campbell v. Falconer*, 5th Mar. 1891, 19 R. 563.

holograph I.O.U. might now be accepted as having the same effect.<sup>1</sup> The creditor under a heritable bond has been decerned executor in virtue of the personal obligation contained therein, the heritage being insufficient to pay the debt (Trail, 28th Jan. 1887). The trustees under an antenuptial contract of marriage, by which the wife had assigned to them the whole estate then belonging to her, or which she might acquire during the marriage, were decerned and confirmed *qua* creditors to certain shares which were held to fall within the terms of the conveyance, but which had not been transferred to the trustees (Brash, 7th Oct. 1887; Jazdowski, 19th March 1889). Decerniture was granted to a creditor under a bill drawn and accepted in India and indorsed to him in London, on an opinion by an English barrister, formerly of Madras, that as regards requisites in form and stamp-duty the bill was in proper order according to the law of India (Tod, 20th Nov. 1885). In this case the domicile was stated to be uncertain, but the circumstance of the deceased being domiciled abroad, and that there has been administration in the country of the domicile, does not affect the competency of confirmation as executor-creditor;<sup>2</sup> and in such cases the applicant is not required to set forth that, by the law of the deceased's domicile, he is entitled to the administration (Tod, 21st Jan. 1869).

Foreign  
debtors.

If the creditor has not a liquid ground of debt, he must constitute his claim under the Act 1695, c. 41, by charging "the defunct's nearest of kin to confirm executor to him within twenty dayes after the charge given, which charge so execute shall be a passive title against the person charged as if he were a vitious intrometter, unless he renunce, and then the charger may proceed to have his debt constitut, and the *hæreditas jacens* of moveables declared lyable by a decree

Debt must  
be consti-  
tuted.

<sup>1</sup> *Theim's Trs. v. Collie*, 14th Mar. 1828, 24 D. 1142; *Story's Conflict*, 1899, 1 F. 764. 563.

<sup>2</sup> *Smith's Trs. v. Grant*, 27th June

CHAP. V. *cognitionis causa*, upon the obtaining whereof he may be decerned executor-dative to the defunct, and so affect his moveables in the common form."<sup>1</sup> It has been decided that the preliminary charge may be dispensed with where the creditor restricts his claim to a decree *cognitionis causa tantum*,<sup>2</sup> but, if charged, the next of kin must either confirm or renounce.<sup>3</sup> Decerniture *qua* creditor was granted under a decree of cognition by the Supreme Court, in which the only defenders called were the universal legatories (Rodney, 3rd June 1887). Where the widow of the deceased was abroad arrestments *jurisdictionis fundandæ causa* had been used against her before raising the action of cognition, and the decree was in favour, not of the original creditor, who held an open account against the deceased, but in favour of deceased's daughter, who had acquired right to the debt (Clarkson, 1st Feb. 1889).

Ranking of  
Creditors.

By Act of Sederunt, 28th February 1662, "All creditors of defunct persons using legall diligence at any time within half ane yeir of the defunct's death, by citation of the executors and intrometters with the defunct's goods, or by obtaining themselves decerned and confirmed executors-creditors, or by citing of any other executors-creditors confirmed, the saids creditors using any such diligence before the expiring of half ane yeir, as said is, shall come *in pari passu* with any other creditors who have used more timely diligence." Beyond the six months, creditors are preferable according to the date of their confirmations to the extent of the sum therein confirmed. But no right is vested or preference obtained by decree-dative without confirmation, and any number of creditors who apply before confirmation may be conjoined in it.<sup>4</sup>

<sup>1</sup> Act anent Executry and Moveables, Appendix II.

<sup>2</sup> Forrest v. Forrest, 26th May 1863, 1 M. 806.

<sup>3</sup> Davidson v. Clark, 13th Dec.

1867, 6 M. 151.

<sup>4</sup> Bell's Lect. ii. 1137; Macleod v. Wilson, 30th May 1837, 15 Sh. 1043; Wilson v. Fleming, 26th June 1823, 2 S. 430.

By the Act of 1823 it was enacted that in the case of CHAP. V. confirmation by executor-creditor, such confirmation might Confirmation may be partial. be limited to the amount of the debt, and sum confirmed to which such creditor should make oath, provided always that notice of every application for confirmation by any executor-creditor shall be inserted in the *Edinburgh Gazette*, at least once, immediately after such application shall be made;<sup>1</sup> in evidence whereof a copy of the *Gazette* in which such notice shall have been inserted shall be produced in Court before any such confirmation shall be further proceeded in.<sup>2</sup> This Act, in granting to executors-creditors the power to expedite a partial confirmation, merely continued in their favour a privilege expressly conferred upon them by Act of Sederunt dated 14th November 1679, that they might not be “unnecessarily entangled in the execution of the defunct’s debts beyond their own satisfaction,” and that there might be “place for an executor *ad omnia* for the rest,”—an executor-creditor like other executors-dative being bound to do diligence in recovering the whole estate confirmed by him, and if he recovers more than sufficient to satisfy his own claim, he is liable to account for it as an ordinary executor would be. In the instructions issued by the Commissaries of Edinburgh, dated 1st January 1824,<sup>3</sup> with reference to this section of the Act, they directed that confirmation by executor-creditor might comprehend no more of the inventory recorded than a sum equal in amount to the debt due and the expense of confirmation; in other words, it might be a confirmation to any extent the executor desired. In terms of what appeared to them to be the mean-

<sup>1</sup> By Act of Sederunt of 12th Nov. 1825, § 19, it was provided that the notice must be inserted “within ten days after the edict has been signed by the clerk.” The edict being now abolished, the notice is in practice inserted in the

first *Gazette* published after the petition (which comes in place of the edict) is presented. There is no time fixed which must elapse between the *Gazette* notice and the calling.

<sup>2</sup> 4 Geo. IV. c. 98, § 4, App. v.

<sup>3</sup> Appendix VI.

CHAP. V. ing of the Act, the Commissaries also in their instructions directed that the creditor should be required to depone to the verity of his debt, but this was held to be unnecessary,<sup>1</sup> and the practice was discontinued.

Inventory  
must be  
complete.

Every inventory given up must be a full and complete inventory of the deceased's estate, although the confirmation may be limited. And the limitation may be either to certain items in the inventory (Macdonald, 17th Dec. 1888 ; Jazdowski, 19th March 1889), or to a portion of one item sufficient to meet the creditor's claim, as may be specified in the oath to his inventory (Bradley, 10th February 1880, and 12th June 1883). Only the items of estate of which confirmation is craved in whole or in part are quoted in the confirmation. A partial confirmation does not carry more than the sum confirmed. And a creditor confirming *ad omissa* may call a creditor partially confirmed to account for what he has drawn beyond the sum confirmed<sup>2</sup> [FORM 28].

Creditors  
of next of  
kin.

Confirmation as executors-dative *qua* creditors is competent not only to the creditors of the defunct, but also to the creditors of his next of kin. The Act 1695, c. 41, above quoted, ordains "That in the case of a moveable estate left by a defunct, and falling to his nearest of kin who lyes out and doth not confirm, the creditors of the said nearest of kin may either require the procurator-fiscal to confirm and assign to them under the perril and pain of his being lyable for the debt, if he refuse, or they may obtain themselves decerned executors-dative to the defunct as if they were creditors to him, with this provision all-ways that the creditors of the defunct doing diligence to affect the said moveable estate, within year and day of their debtor's deceas, shall always be preferred to the diligence of the said nearest of kin." Even after the expiry of the year

<sup>1</sup> Greig v. Christie, 1st Mar. 1837, 15 S. 697.

<sup>2</sup> Lee v. Donald, 17th May 1816, F.C. ; Erskine, 3. 9. 37.

and day the creditors of the deceased may be preferred to those of his next of kin.<sup>1</sup> Confirmation to the estate of a deceased has been granted to the trustee on the sequestrated estate of his next of kin (Macdonald, 9th July 1857); and even where the defunct had died domiciled abroad, under a decree by the Lord Ordinary, finding that the bankrupt's interest in his ancestor's succession had vested in the trustee (Davidson, 19th April 1866) [FORM 29].

By the Bankruptcy Act 1856, it is incompetent for any creditor of a deceased debtor, after the date of the first deliverance on a petition for sequestration of his estate, to be confirmed executor-creditor of the deceased debtor; and where the sequestration of the estate of a deceased debtor is dated within seven months of his death, any confirmation as executor-creditor is of no effect in competition with the trustee, but any creditor confirmed shall have preference for payment of his expenses.<sup>2</sup>

An incorporated company was decerned *qua* creditor, the oath to the inventory being taken by the secretary (Whitson, 15th Jan. 1874); also a trading firm "along with A. and B., the individual partners thereof" (Fortune, 16th Nov. 1855). A. and B., the individual partners of A., B., and Company, were decerned executors-dative *qua* creditors of the defunct C., an individual partner of the firm of C., D., and Company, the ground of debt being a bill for £1000, drawn by A., B., and Company, and accepted by C., D., and Company (Sibbald, 17th April 1862). One of two trustees in whose favour the deceased had granted a bill, was decerned *qua* creditor, the other trustee being abroad (Hitchcock, 2nd June 1870). A confirmation *ad male apprehiata* was issued in favour of an executor-creditor, containing the same item of estate as had been confirmed in the original confirmation in favour of another executor-creditor, but valued at £100

<sup>1</sup> Erskine, 3. 9. 35; Bell's *Commentaries*, ii. 81.

<sup>2</sup> 19 and 20 Vict. c. 79, §§ 30, 110.

CHAP. V. more—the additional value only being confirmed, and the first executor neither objecting nor asking to be conjoined in the second confirmation (Malcolm, 30th Nov. 1878). Decerniture *qua* creditor being craved under an unstamped deed, its liability to stamp-duty was referred by the Sheriff to the Inland Revenue authorities, by whom the stamp was adjudicated, a stamp being impressed and the penalty paid (M'Grigor, 22nd Oct. 1880). Decerniture *qua* creditor was granted in favour of a trust disponee for behoof of creditors, the truster having died before the trustee had obtained possession of all the estate (Scott, 13th April 1882).

Liquidators.

The Liquidators of the Western Bank of Scotland were decerned executors-dative *qua* creditors on the estate of a deceased shareholder, conform to act and decree of the Lords of Council and Session produced (Bishop, 31st Oct. 1861). But under the Companies Act 1862, it was held that the Liquidators of the City of Glasgow Bank were entitled to be decerned and confirmed "*qua* Liquidators of the City of Glasgow Bank, of which the deceased was a contributor"<sup>1</sup> (Mackenzie, 14th Feb. 1879).

Funerator.

Confirmation as executor-dative *qua* functor is held to be competent only in small estates where the next of kin are unknown or unable to act, or, after due intimation, do not claim the office of executor. If there are no known next of kin special intimation requires to be made to the King's and Lord Treasurer's Remembrancer of Exchequer. The only ground of debt required is the undertaker's account, where the undertaker is the applicant, or the discharged account if the application is made by the person who has paid it. The applicant must set forth all he has been able to ascertain about the relations of the deceased, and whether they decline to act. Intimation is made in the *Gazette* and also in such other newspapers as the Sheriff may consider necessary, according to the information supplied by the petition. Where a functor

<sup>1</sup> 25 and 26 Vict. c. 89, § 95.

had been decerned but not confirmed, a next of kin who appeared was preferred, and the functor's appointment recalled, without expenses, on the ground that he had not communicated the death to the next of kin (Pyper, 4th March 1869). Where it was stated that the deceased was illegitimate and unmarried, and evidence was produced that the Crown did not object to the application, the functor was decerned without any advertisement for next of kin (Maclery, 15th Nov. 1878). But where a functor had been decerned and it appeared on his giving up the inventory that the estate amounted to over £500, intimation was made to the Queen's Remembrancer, who objected to confirmation being proceeded with, and at once entered on possession of the estate (Tweedie, 28th July 1864) [FORM 30].

In cases where the Crown has any interest to interfere as *ultimus hæres*, the King's and Lord Treasurer's Remembrancer takes possession of the estate, however invested, without any title by confirmation, pays the debts due by the deceased, and retains the balance, subject to such disposition thereof by way of gift or donation, as the Lords of the Treasury may be pleased to grant on any application made to them.<sup>1</sup> The donee, on certain conditions as to security, and under deduction of a proportion, varying from a fourth to a tenth of the estate, which is held to cover all duties which would have been payable on it as succession, obtains a deed of gift which constitutes a good title to possess the estate conveyed by it, and also, it would appear, to recover any portion of such estate which may not have been uplifted or

CHAP. V.  
Funerator.

Crown as  
*ultimus*  
*hæres*.

<sup>1</sup> Applications for gifts of estates fallen to His Majesty as *ultimus hæres* should be in the form of petitions to "The Right Honourable the Lords Commissioners of His Majesty's Treasury." The first petition in each case should be forwarded to "The Secretary to the Treasury, London." All subsequent

proceedings pass through the Exchequer in Edinburgh, and additional petitions and other papers should be forwarded to "The King's and Lord Treasurer's Remembrancer, Exchequer Chambers, Edinburgh," from whom all the necessary instructions as to procedure may be obtained.

CHAP. V. realised by the officers of the Crown. No confirmation, therefore, of such estate is ever required in Scotland; but where a portion of the estate belonging to the deceased and included in the gift was situated in England, where administration even on the part of the Crown is necessary as a title to uplift, the donee applied for and obtained decerniture and confirmation *qua* donee of the Crown, of the whole estate, including the portion in England;<sup>1</sup> and the confirmation was thereafter sealed in the English Probate Court. This course, however, involved the payment of inventory duty, which would otherwise have been unnecessary, the Crown having already made the usual deduction in lieu of duties.

**Legatees.** Legatees include both special legatees, to whom a specific article or investment or debt has been bequeathed, and also those upon whom the deceased has conferred any limited interest, either of liferent or fee, in his succession, under any writing of a testamentary nature [FORM 31]. Where the legatee dies after the legacy has vested without having expedite confirmation, his representatives will require in the first place to confirm to the legatee, and thereafter to the legator as legatee by succession.<sup>2</sup>

**Judicial factors.**

By Act of Sederunt of 13th Feb. 1730, which, although its provisions were by § 12 extended to all judicial factors thenceforth to be appointed by the Lords of Council and Session, relates primarily to factors on the estates of pupils not having tutors, and of persons absent that have not sufficiently empowered persons to act for them, or who are under some incapacity for the time to manage their own estates,—it is provided that where it is necessary by law that the money or effects or moveables falling under the factory should be confirmed, the factor “may confirm the same in his own name as executor-dative and as factor appointed by the Lords of Council and Session on the estate of such a

<sup>1</sup> In the Sheriff Court at Stonehaven, *Galbraith*, 19th Feb. 1889.

<sup>2</sup> Bell's *Principles*, 1896.

person and for the use and behoof of the said person and of all that have or shall have interest, unless some other person having a title offer to confirm" (§ 7). And this provision is applicable also to judicial factors appointed in the Sheriff Court.<sup>1</sup> This provision evidently contemplates and provides for the case of a factor who is appointed not on the estate of the deceased, but on the estate of some person having a beneficial interest in the deceased's succession, such as a *curator bonis*, or factor *loco tutoris* or *loco absentis*, to the next of kin.<sup>2</sup> A tutor-at-law to the children of the defunct is also entitled to confirmation in his own name (Ritchie, 22nd May 1856) [FORM 40].

It was formerly considered matter of doubt whether a judicial factor appointed not on the estate of a beneficiary, but on the estate of the deceased, required to complete a title by confirmation in order to recover the estate. Generally, his appointment as factor was found to be sufficient, but confirmation was considered not incompetent, and was sometimes resorted to as a convenient means of showing that inventory duty had been paid, and if any of the estate was situated in England or Ireland, where his title as factor might not be recognised, it enabled him as executor to obtain possession of it. The Judicial Factors (Scotland) Act 1889,<sup>3</sup> may now be held to have removed all doubt on the subject, though the factor may still be decerned executor and obtain confirmation if he desire it. And whether he applies for confirmation or not he will require to give up an inventory and pay the duty, though he may do this, as he always could, as factor, without being decerned executor. It has been held that a judicial factor under the Bankrupt (Scotland) Act 1856,<sup>4</sup> is entitled to object to the decerniture of an executor-dative *qua* next of kin, on the ground that such

<sup>1</sup> 43 and 44 Vict. c. 4 (4).

<sup>3</sup> 52 and 53 Vict. c. 39, § 13.

<sup>2</sup> Whiffen v. Lees, 12th June 1872,

<sup>4</sup> 19 and 20 Vict. c. 79, § 164.

per Lord President, 10 M. 800.

CHAP. V. an appointment would conflict with his own, the powers and duties conferred upon him being such as to entitle him to the sole administration of the estate (Sutherland, 16th April 1880). But where a judicial factor had been appointed in the Sheriff Court without due inquiry, the Supreme Court recalled the appointment at the instance of a next of kin who had been decerned executor-dative.<sup>1</sup> Whether the administration should be in the hands of an executor or of a judicial factor is a matter within the discretion of the Court. Where an estate consisted of heritage and moveables, and its solvency was doubtful, the Court preferred the factor who had been appointed at the instance of the heritable creditors.<sup>2</sup> But though the office of executor and the necessity for confirmation appear to be entirely superseded by an appointment as judicial factor on the deceased's estate, the appointment of a trustee on the sequestrated estate of a deceased has not the same effect. Where the trustee had realised the whole of the estate, and after paying the debts there remained a large surplus in his hands, the Supreme Court directed that confirmation should be issued in favour of the next of kin in order to uplift the estate from the trustee<sup>3</sup> [FORM 41].

Trustee  
on seques-  
trated  
estate.

Procurator  
fiscal of  
Court.

Confirmations in favour of the procurator-fiscal of the Commissariat of Edinburgh have not been frequent in recent years. In a case where a deceased person had left considerable personal estate and no executor-nominate or next of kin appeared to take out confirmation, the procurator-fiscal at the instance of persons having claims against the deceased, was decerned and confirmed as executor, and thereafter realised the estate. It having been ascertained that the deceased was illegitimate, and had never been married, the estate was handed over to the Crown (Grant, 29th Dec. 1870). In this case the opinion of Crown counsel had been obtained in

<sup>1</sup> Cuthbertson v. Gibson, 31st May 1887, 14 R. 736.

Barber, 7th Nov. 1895, 23 R. 90.

<sup>2</sup> Masterton v. Erskine's Trs., 14th May 1887, 14 R. 712; Campbell v.

<sup>3</sup> Bell v. Glen, 28th June 1883; not reported.

favour of the competency of the procedure. Every petition for the appointment of the procurator-fiscal of Court as executor-dative should set forth the parties at whose request and the circumstances under which it is presented; and wherever it appears that the deceased has died without any known legal representatives, and that the Crown may have an interest as *ultimus hæres*, special intimation must, under an Order by the Commissary, dated 28th May 1872, be made to the King's and Lord Treasurer's Remembrancer. CHAP. V.

A married woman may be decerned and confirmed as executor-dative, but the petition for decerniture must be presented with her husband's consent. If consent is not set forth in the petition, a minute of concurrence (Craigie, 22nd Aug. 1861), or a minute sisting the husband as a party (Turnbull, 25th June 1874) must be lodged before decree. Where a wife had been deserted by her husband his consent was dispensed with (Mackay, 3rd Oct. 1867). By the Married Women's Property Act 1881, where a wife is deserted by her husband, or is living apart from him with his consent, a judge of the Court of Session or Sheriff Court, on petition addressed to the Court, may dispense with the husband's consent to any deed relating to her estate.<sup>1</sup> A special petition is not necessary. In the petition for decerniture the husband's desertion, its duration and what his wife knows about him may be set forth, and the Sheriff on being satisfied of the fact may dispense with his consent and grant decree (Adam, 19th Feb. 1886). In a case where the wife was living apart from her husband with his consent under a minute of agreement which was produced, the Sheriff dispensed with his consent to the Petition, and after decerniture, to all deeds and proceedings relating to the executry estate of the deceased (M'Naughton, 24th May 1899). In small estate cases the desertion is deponed to by the applicant, and her statement attested by the witnesses, and

<sup>1</sup> 44 and 45 Vict. c. 21, § 5.

CHAP. V. the Sheriff grants a Fiat on the Inventory (Shankland, 7th April 1884). It would appear that where the husband does consent to his wife's appointment as executor, and she has no separate estate, he becomes liable for the obligations she incurs in that character.<sup>1</sup>

Pupils and  
minors.

Pupils and minors may be decerned and confirmed as executors-dative either in their own names or along with their legal guardians, on an application at their instance with the consent and concurrence of such guardians.<sup>2</sup> An application by a father to be decerned executor-dative *qua* administrator in law for two of his pupil children on the estate of their mother was refused by the Commissary Depute, and the pupils themselves were decerned executors-dative *qua* next of kin, their father being decerned along with them as their administrator in law, "in respect that the practice had been to decern pupils and minors, and not their fathers as their administrators in law, executors to defunct persons, and that no sufficient reason had been assigned for the present motion to deviate from that practice;" and this judgment was, on appeal to the Commissary, adhered to (Fletcher, 24th and 31st Dec. 1852). Where the father is dead, but has appointed tutors and curators to his children, they also may be decerned and confirmed along with the children (Laing, 8th Sept. 1854; Cadell, 2nd May 1861). But pupils and minors may be decerned and confirmed alone, the oath to the inventory being taken by the administrator (Drummond, 11th Feb. 1876) or curator (Thomson, 14th June 1878), though a minor may also make oath to an inventory (Leyden, 22nd April 1882 [Forms 36, 37].

Commissary  
Factors.

When the applicant for confirmation was a pupil or minor without any legal guardian, the Commissaries were in use to appoint a curator or factor, with power to act for or with

<sup>1</sup> Pattison v. M'Vicar, 5th Feb. 1886, 13 R. 550; but see Macgown v. Cramb, 19th Feb. 1898, 25 R. 634.

<sup>2</sup> Reid v. Turner, 23rd June 1830, 8 S. 960; Keith v. Archer, 24th Nov. 1836, 15 S. 116

him as executor in the confirmation, and the practice was recognised and sanctioned by the Supreme Court.<sup>1</sup> The usual practice in the Commissariat of Edinburgh is to appoint the factor in the first instance, who is thereafter decerned and confirmed as executor-dative *qua* factor. But it is equally competent first to decern the minor or pupil as executor-dative, and then appoint the factor, with power to give up inventory and expedite confirmation in his own name as factor. A third method is first to appoint the factor, and then to decern and confirm the minor, and the factor along with him. This last method has the advantage that, in the event of the administration of the estate not being completed before the minor has attained majority, his own title to act emerges without any new appointment (Rae, 17th Jan. 1889). A factor may be appointed for a minor who is universal legatory, as well as for one who is next of kin (Nicol, 25th May 1871). Where the deceased died domiciled in England, a factor was appointed for his minor children, the relict having renounced, and the only next of kin *sui juris* being in New Zealand (Roy, 22nd March 1877). The application for the appointment of factor is at the instance of the children themselves, and of their nearest relatives both on the father's and mother's side, so far as can be ascertained. The office has always been considered gratuitous, and is conferred on some near relation of the children, whom the Sheriff may consider a fit and proper person to entrust with its duties. The factor must reside in Scotland (Chafford, Dec. 1867),<sup>2</sup> and must find caution as factor before being decerned executor, and also as executor before being confirmed. Commissary factors are now held to be subject to the supervision of the Accountant of the Court of Session under the Judicial Factors Act 1889,<sup>3</sup> and the factor's bond

<sup>1</sup> *Johnstone v. Lowden*, 15th Jan. 1870, 8 M. 426.  
Feb. 1838, 16 S. 541.

<sup>3</sup> 52 and 53 Vict. c. 39, § 6.

<sup>2</sup> See *Ferguson v. Dormer*, 25th

CHAP. V. is transmitted to him on their appointment. Where the father was a foreigner and the child in this country with its maternal relatives, a factor was appointed at the father's instance for the child on the mother's estate (Palumbo, 14th July 1870). It is not usual to appoint a factor for children on the estate of their father when there is a relict, unless with her consent (Anderson, 29th May 1873), or unless there is some special reason for her exclusion from the office of executor (Nicolson, 17th Feb. 1882). The Commissary of Perth appointed a factor for the child of the deceased, and decerned him executor in preference to the widow.<sup>1</sup> The appointment may be in favour of two persons and the survivor of them (Jobson, 21st Dec. 1900). In *Johnstone v. Lowden* the factor was the mother, and it has been held not incompetent to appoint a maternal aunt where there was no other relative in this country (Hanson, 19th May 1877) [FORMS 54, 38, 39].

Petitions  
for decerni-  
ture.

Applications for decerniture as executor-dative are now regulated by the Confirmation and Probate Act 1858.<sup>2</sup> It was thereby enacted that from and after the 12th day of Nov. 1858 the practice of raising edicts of executry before the Commissary Courts in Scotland for the decerniture of executors to deceased persons should cease, and that every person desirous of being decerned executor of a deceased person as dispositive, next of kin, creditor, or in any other character whatsoever now competent, or of having some person possessed of such character decerned executor to a deceased person, should present a petition to the Commissary for the appointment of an executor, in the form prescribed by the Act (§§ 1, 2).

Petitioners  
only can be  
decerned.

In providing that a petition might be presented by any person desirous of being decerned himself, or of having "some other person" decerned, it seems to have been originally

<sup>1</sup> *Scot Law Magazine*, vol. 4, 153 (Robb, 1865).

<sup>2</sup> 21 and 22 Vict. c. 56, Appendix VIII.

intended that it should still be competent under the petition, CHAP. V.  
 as it had been under the edict, for the judge, at the calling  
 of the cause in Court, to appoint any one who might appear  
 and claim the office of executor, either along with or in pre-  
 ference to the party at whose instance the application for the  
 appointment of an executor had been made. The question  
 was raised soon after the passing of the Statute, when a  
 petition was presented by the relict of a defunct, and, at the  
 calling the solicitor produced a joint minute by the petitioner  
 and a son of the defunct, setting forth that the son had a  
 preferable title to the office, and that the petitioner had  
 agreed to his being appointed, and moved for decree accord-  
 ingly. The motion was refused by the Commissary Depute,  
 who thought it quite impossible to substitute as executor a  
 person different from the one who presented the petition,  
 and whose application had been intimated as required by the  
 Statute; and on appeal to the Commissary this judgment  
 was affirmed (Chalmers, 8th and 24th February 1859).

The form of petition prescribed by the Act of 1858 has Particulars  
required.  
 been superseded in practice by that prescribed by the Sheriff  
 Court Act of 1876;<sup>1</sup> but it is necessary to observe the par-  
 ticulars required by the earlier Statute to be set forth in  
 the petition.

It is required that the place and date of death should be Place and  
date of  
death.  
 stated. Where the deceased has died abroad, or where a con-  
 siderable interval has elapsed since the death, it is sometimes  
 difficult to ascertain the precise place and date; but they  
 must be set forth as exactly as possible. Where the deceased  
 had sailed from Madeira on 22nd Nov. 1877, in a ship which  
 had never thereafter been heard of, he was described as having  
 died at sea on or since that date (Macleod, 15th March 1878).  
 Where the deceased has been a sailor or passenger in a ship  
 which has been lost at sea it is usual to obtain a certificate  
 of death from the Registrar-General of Shipping and Seamen,

<sup>1</sup> See Chap. XII., "Judicial Proceedings."

CHAP. V. Custom House, London, and to set forth the date of death as on or about the date given in the certificate as that since which the ship has been missing. In all cases, however, the fact of death must be distinctly averred (Knox, 23rd Dec. 1873). A statement that the person to whose estate confirmation is wanted has disappeared, and is believed to be dead, is not sufficient (Johnston, 12th March 1869). In such cases, the application for confirmation must be preceded by a Decree under the Presumption of Life Limitation Act 1891,<sup>1</sup> finding that the person who has disappeared shall be presumed to have died on the date specified in the Decree. Where the fact of death is distinctly averred in a petition for decerniture, no proof is required unless the statement is challenged; but where this was done by a factor and commissioner whom the alleged deceased had appointed before leaving this country for Australia, a proof was allowed; and on the evidence being reported and considered sufficient, decerniture was granted (M'Ewen, 26th May and 6th June 1882).

Domicile  
of the  
deceased.

It is also required that the domicile of the deceased be set forth, with a view to determine the jurisdiction, in terms of § 3 of the Statute, which enacted that petitions must be presented to the Commissary of the county wherein the deceased died domiciled; and in the case of persons dying domiciled furth of Scotland, or without any fixed or known domicile, having personal or moveable property in Scotland, to the Commissary of Edinburgh (page 28).

Title of  
petitioner.

It is further required that the petitioner shall state what relationship, character, or title he has, giving him right to apply for the appointment of executor. Under Regulations issued by the Commissaries of Edinburgh in 1817, it was a rule in regard to edicts that, "if at the instance of the next of kin, they shall distinctly mention the degree of propinquity of the mover to the deceased, and by whom related." This

<sup>1</sup> 54 and 55 Vict. c. 29.

requirement has been continued in regard to petitions, and has occasionally revealed the fact that the applicant was related through the mother, and had, therefore, no title. It is also required in practice that the petition should definitely state the relationships of the deceased in such a manner as to clear off those whose title would exclude that of the applicant. Thus, where the petition is by the mother, it should state that the deceased died intestate and without issue, and that his father predeceased him, as it is only in these circumstances that she has any right to the office of executor. And where the petitioner claims the office as next of kin, his averments should be so framed as to show that in a question of succession he is entitled to that appellation. The effect of this requirement sometimes is to make it appear that the applicant is not really next of kin, and sometimes not even entitled to share in the succession. Under the Regulations above referred to it was ordered that "if the edict be at the instance of a creditor, the ground of debt shall be specially narrated in it; if at the instance of a dis-  
ponee or legatee the deed under which he claims to be confirmed shall also be specially mentioned in the edict;" and the documents founded on were ordered to be produced at the calling "that they may be examined before the mover is decerned." This rule also is applied to petitions, and is in accordance with the original Instructions to the Commissaries of 1666. The documents are, with an inventory of productions, usually lodged along with the petition.

CHAP. V.

Preferable claimants cleared off.

Documents founded on produced.

Where the deceased has died domiciled furth of Scotland, the character or title in which the applicant claims the office of executor must be set forth as instructed by the law of his domicile; and a distinct averment must be made that according to such law the petitioner is entitled to decerniture in the character set forth, in accordance with the practice already described as applicable to such cases (page 25) [FORMS 42-48].

Law of domicile.

CHAP. V.  
Domicile  
uncertain.

The phrase in the Statute, "without any fixed or known domicile," is understood to mean that the domicile has not been ascertained. Where the uncertainty is in what particular county in Scotland the deceased was domiciled, it is usual to aver that the deceased died "without any fixed or known domicile except that the same was in Scotland;" and this averment not only brings the case within the jurisdiction of the Sheriff Court of Edinburgh, but shows that the title of the applicant must be determined by the law of Scotland, and that, of course, no statement as to the law of domicile is required. Where the uncertainty is as to the country of the deceased's domicile it generally arises in an alternative form; that is, whether the deceased was domiciled in Scotland or in some other country where he was for the time residing; and in such cases the law may be stated alternatively. Where the domicile cannot be precisely stated, should it appear that any person other than the applicant might possibly fall to be preferred, the consent of such person should be produced. In all cases of uncertain domicile the cause of uncertainty should be succinctly explained in the petition, and in the designation of the deceased the residences giving rise to the uncertainty should be briefly stated (page 28) [FORM 49]. In such cases, of course, only Scotch estate can be confirmed.

Where  
death pre-  
sumed.

The decree under the Presumption of Life Limitation Act 1891<sup>1</sup> does not, like that under the Act of 1881 which it repeals, find who are entitled to succeed to the person who has disappeared, but merely that he has died on a certain date. Such a decree therefore gives no authority to any particular person to apply for decerniture. But § 3 provides that nothing therein contained shall entitle any person to any part of the intestate moveable succession of a person who has disappeared if the latter was not a domiciled Scotsman at the date at which he is proved or presumed to

<sup>1</sup> 54 and 55 Vict. c. 29.

have died. It must, therefore, be averred in all applications CHAP. V. for decerniture that the deceased was at the date of his death domiciled in Scotland, and that being so the right to decerniture falls to be regulated by the ordinary rules applicable to intestacy in Scotland [FORM 50].

Where a husband and wife and their only child perished Survivance doubtful. in the wreck of the same ship, and no information could be obtained as to the predecease of one or the other, the brother and sister of the husband applied for decerniture to him in the alternative character of next of kin, or representative of the next of kin—the former if the father, the latter if the child survived—and the application was granted as craved (M'Leod, 9th March 1883).

Provision was made for the intimation of petitions by the Act of 1858, § 4, directing that every petition for appointment as executor, in place of being published at the kirk-door and market-cross, as edicts of executry had been in use to be published, should be intimated by the Commissary Clerk affixing on the door of the Commissary Court-house, or in some conspicuous place of the Court and of the office of the Commissary Clerk, in such manner as the Commissary might direct, a full copy of the petition, and by the Keeper of the Record of Edictal Citations at Edinburgh inserting in a book, to be kept by him for that purpose, the names and designations of the petitioner and of the deceased person, the place and date of his death, and the character in which the petitioner sought to be decerned executor; which particulars the Keeper of the Record of Edictal Citations should cause to be printed and published weekly, along with the abstracts of the petitions for general and special services. And by Act of Sederunt provision was made by the Court for the transmission to the said Keeper of a note of the particulars he was required to publish, and for the transmission by him to Commissary Clerks of a certified copy thereof as published.<sup>1</sup>

<sup>1</sup> Act of Sederunt, 19th March 1859, Appendix ix.

## CHAP. V.

Certificate  
of intima-  
tion and  
publica-  
tion.

By § 5 of the Statute it was enacted that the Commissary Clerk, after receiving the certified copy of the printed and published particulars, should forthwith certify on the petition that the same had been intimated and published, in terms of the provisions of the Act, in the form of Schedule C, annexed to the Act, and that such certificate should be sufficient evidence of the facts therein set forth; it being also provided that where a second petition for confirmation was presented in reference to the same personal estate, the Commissary should direct intimation of such petition to be made to the party who presented the first petition. And by § 4 of the said Act of Sederunt, it was directed that the certificate of intimation to be granted by the Commissary Clerk, in terms of § 5 and Schedule C of the Statute, should be dated, and the date of the certificate should regulate the time when the petition for appointment of an executor might be called in Court, in terms of § 6 of said Statute. It would appear, however, that § 5 of the Statute, though only the schedule to which it refers is expressly repealed, is superseded by § 44 of the Sheriff Courts Act 1876,<sup>1</sup> which enacts that the Sheriff Clerk shall, after a petition for the appointment of an executor has been intimated by him as provided by § 4 of the Confirmation and Probate Act, and after receiving the certified copy of the printed and published particulars therein set forth, "forthwith certify these facts on the petition in the following or similar terms: 'Intimated and published in terms of the Statute,' which certificate (in lieu of the certificate in the form of Schedule C annexed to the said Act, which Schedule C is hereby repealed), shall be dated and signed by him, and shall be sufficient evidence of the facts therein set forth: Provided always, that special intimation shall be made to all executors already decerned or confirmed to a deceased person, of any subsequent petition for the appointment of an executor which may

Form of  
certificate.

Special  
intimation.

<sup>1</sup> 39 and 40 Vict. c. 70.

be presented with reference to the personal estate of the same deceased person.” The effect of this provision is to substitute a shorter form of the certificate of intimation than that required by the earlier Statute. And it seems also to have been intended to amend that Statute in regard to the intimation of second petitions, by providing that intimation should be made only when confirmation or decree-dative had been obtained, and that it should be made to all executors, whether they had applied by petition or not,—the earlier Statute having appeared to require that intimation should be made to a first petitioner, even though his petition had been abandoned or withdrawn, and having left it doubtful whether intimation must be made to an executor-nominate, who generally obtains confirmation without a petition at all.

The object of special intimation in the case of an executor already confirmed is to enable him to apply for an eik, to which he may have a preferable right, or to be conjoined in the new confirmation: and, in the case of an executor-dative decerned but not confirmed, to enable him to appear and defend his decree, which must be recalled before any new decerniture can be granted. Where special intimation is required by the Statute, the petition should narrate the previous confirmation or decree-dative, and, under Instructions by the Commissary of Edinburgh, dated 4th July 1859, crave an order for instant intimation to the first executor, or his known agent, by service of a full double thereof, which must be executed in due form,<sup>1</sup> except when the party or his known agent shall accept service. Where the executor already confirmed or decerned is dead, the practice is to set forth the fact in the second petition, and that, therefore, no special intimation is necessary [FORMS 51, 52, 53].

By § 6 of the Statute of 1858 it was provided that on the expiration of nine days after the Commissary Clerk should have certified the intimation and publication of a petition for

<sup>1</sup> 45 and 46 Vict, c. 77.

CHAP. V. the appointment of an executor, the same might be called in Court, and an executor decerned, or other procedure might take place according to the forms previously in use in case of edicts of executry, and with the like force and effect ; and that decree-dative might be extracted on the expiration of three lawful days after it had been pronounced but not sooner. The edict of executry contained no craving. It was simply a summons at the instance of any one having an interest, by open proclamation at the market-cross and parish kirk-door, to all concerned, to compear on a certain day at the hour of cause to hear and see executors-dative decerned to the defunct. At the calling, upon motion made for the raiser, if there was no competition, and he alleged a competent title, he was decerned. But any one might come forward, even without any notice of appearance, and claim the office. If he had as good a title as the raiser, he was conjoined ; if he had a better title, he was preferred. This procedure has, as already stated (page 107), been found incompetent under the petition. The person who presents the petition can alone be decerned under it. Any one who wishes to be conjoined in or compete for the appointment should, before the calling, lodge a notice of appearance, and at the same time present a petition for appointment in his own favour in the statutory form.<sup>1</sup> The effect of a decree-dative under a petition is the same as it was under an edict. The person decerned is entitled to sue debtors to the estate but cannot uplift or grant discharges for any part of it until he has given up inventory, made faith and found caution, which by the older form of the decree he was expressly ordained to do and expedite confirmation.

When  
decree-  
dative  
final.

Though decree-dative may be extracted, or confirmation issued, on the expiration of three lawful days after it has been pronounced, yet where there has been competition, no extract or confirmation is issued until the period has elapsed within which it would be competent to appeal, without the

<sup>1</sup> See Chap. XII., "Judicial Proceedings."

order of the Sheriff.<sup>1</sup> Where a decree-dative had been granted on the 14th, and confirmation thereon issued by a sheriff-clerk on the 16th day of the same month, the latter was reduced by the Lord Ordinary (Trayner) on the ground that the decree-dative was not final.<sup>2</sup>

CHAP. V.

A decree-dative may be recalled, and a new executor conjoined or substituted at any time before confirmation is issued, even though the decree may have been extracted,<sup>3</sup> but where the decree has been extracted reservation may be made of its effect as regards any competent proceedings which may have been taken under it (Cochrane 15th January 1853 ; Forbes, 11th June 1889). In a case which occurred in the Commissariat of Haddington (Nisbet, Dec. 1882), the Sheriff, on appeal, held that where a confirmation had been prepared and signed by the Clerk, but was lying in his hands undelivered, it was still competent to apply for recall of the decree-dative and to be conjoined in the appointment. But an application to recall a decerniture, and the confirmation which had been issued thereon, in favour of one of the next of kin, with a view to another next of kin being conjoined in a new decerniture and confirmation, was refused as incompetent (Campbell, 13th Oct. 1879).<sup>4</sup>

Decree may be recalled before confirmation.

Formerly there was some doubt as to whether the office of executor-dative enured to the survivors where there are more than one.<sup>5</sup> It has now been provided by the Executors (Scotland) Act 1900, § 4, that in all cases where confirmation is, or has been, granted in favour of more executors-dative than one, the powers conferred by it shall accrue to the survivors or survivor, and while more than two survive

Surviving executors-dative.

<sup>1</sup> See 39 and 40 Vict. c. 70, § 32.

<sup>2</sup> Collings v. Bell, 6th Dec. 1889, not reported.

<sup>3</sup> Webster v. Shiress, 25th Oct. 1878, 6 R. 102 ; M'Pherson v. M'Pherson, 7th Feb. 1855, 17 D. 358.

<sup>4</sup> See also *Sheriff-Court Reports*, vol. ii. p. 83.

<sup>5</sup> Anderson v. Kerr, 15th Nov. 1866, 5 M. 32 ; M'Laren on *Wills*, 1665.

CHAP. V. a majority shall be a quorum, and each shall be liable only for his own acts and intromissions. The provision applies only to executors-dative who have been confirmed. All the executors decerned must concur in giving up inventory and expediting confirmation. Where one of a number of executors-dative dies or desires to withdraw before confirmation, the survivors are required to obtain either a recall of the decerniture and decerniture of new in their own favour (Stewart, 24th June 1875), or the special authority of the Court to confirm them as survivors, which is held equivalent to a judicial restriction of the decree-dative in their favour (Lamond, 16th Dec. 1859; Paul, 23rd Oct. 1882). A decree-dative may be recalled by a Minute on the Petition (FORM 59).

Executors  
abroad.

Persons may be decerned and confirmed as executors-dative though resident abroad. A power of attorney in favour of some person in this country may be granted by such persons to present the Petition and to make oath to the inventory. But the petition must always be in the name of the party, who alone is decerned and confirmed, and who also, if within the United Kingdom, is required personally to make oath to the inventory (FORM 72).

Corpora-  
tions and  
Com-  
panies.

Corporations and Companies may be executors-dative as well as executors-nominate. The Royal Infirmary was decerned *qua* universal legatee (Grierson, 14th Jan. 1890), (pp. 65, 97).

## CHAPTER VI.

### INVENTORIES OF PERSONAL ESTATE.

ALL executors, whether nominate or dative, were, according to the ancient practice of the Commissary Courts, bound to give up on oath an inventory of the whole moveable estate of the deceased, in so far as consisted with their knowledge, in order to obtain confirmation. But from a very early period the Commissaries had dispensed with a complete inventory, and admitted confirmation to be issued on whatever inventories were offered by the executors; and it was decided that they were obliged to do this, and to confirm executors upon any inventory, though it should be notoriously defective. Nor were executors obliged to expedite confirmation at all if they could recover the estate without it. The Commissaries and their fiscals, clerks, and officers had at one time the right to compel executors to confirm the testaments of their deceased relatives, but they were forbidden by Statute to exercise this right except at the instance of the relict, bairns, nearest of kin, or creditors of the defunct.<sup>1</sup> In cases of intestacy confirmation to some portion of the estate was necessary to vest the succession in the next of kin; but confirmation to a part was held sufficient to vest the whole succession, so that, wherever any item of the estate could be recovered without confirmation, executors either omitted it from the confirmation altogether, or confirmed only a part of it. This was done in order to avoid the heavy charges which were levied in the form of a

CHAP. VI.  
Former  
practice.

<sup>1</sup> Act anent the Confirmation of Testaments, 1690, c. 26, App. I.

CHAP. VI. poundage or percentage on the amount confirmed. The quot or bishop's portion, originally amounting to one-twentieth part of the moveables, without deducting the debts, had been restricted to one-twentieth of the free estate in 1669, and was entirely abolished in 1701; but there remained various charges—compositions, consignation fees, sentence-money—amounting together to a tax of from 1 to  $3\frac{1}{2}$  per cent. on the estate. Another reason for limiting the sum confirmed was that it determined the amount of the security, which all executors, nominate as well as dative, were then bound to find. When confirmation could not be dispensed with, however, some inventory had to be given up as the subject of it, and a value in money attached to each of the items.<sup>1</sup>

Complete  
inventories  
required.

By the Revenue Act of 1808,—superseding the provisions of a prior Statute dated 28th July 1804, under which stamp-duty had been impressed not on the inventory but on the confirmation,<sup>2</sup>—it was enacted that all and every person or persons who, as executor or executors, nearest in kin, creditor or creditors, or otherwise should intronit with or enter upon the possession or management of any personal or moveable estate or effects in Scotland of any person dying after the tenth day of October 1808, should on or before disposing of or distributing any part of such estate or effects, or uplifting any debt due to the deceased, and, at all events, within six calendar months next after having assumed such possession or management, in whole or in part, and before any such person or persons should be confirmed executor or executors, testamentary or dative, exhibit upon oath or solemn affirmation in the proper Commissary Court in Scotland, a full and true inventory duly stamped as required by the Act, of all the personal or moveable estate and effects of the deceased already recovered or known to be existing, distinguishing

<sup>1</sup> Erskine, 3. 9. 33; Mor. Dict.,  
voco "Executor."

<sup>2</sup> 44 Geo. III. c. 98, § 23. See  
Chap. XIII.

what should be situated in Scotland and what elsewhere, CHAP. VI.  
 which inventory should be recorded in the books of said Court, and that it should not be lawful for any Commissary Court in Scotland to grant confirmation of any testament, testamentary or dative, or eik thereto, of or for any estate or effects whatever of any person dying after the tenth day of October 1808, unless the same should be mentioned and included in some such inventory, exhibited and recorded as aforesaid; and that it should not be competent to any executor or executors, or other person or persons, to recover any debt or other effects in Scotland, of or belonging to any person dying after the said tenth day of October, unless the same should have been previously included in some such inventory exhibited and recorded as aforesaid; except the same respectively were vested in the deceased as a trustee for any other person or persons, and not beneficially; but these provisions were not in other respects to prejudice the law of Scotland regarding total or partial confirmations, or the rules of succession there established.<sup>1</sup> The effect of these enactments was that executors were bound to give up a full inventory of the estate duly stamped, and it was unlawful to confirm and incompetent to recover any estate not included in such inventory; but they were not bound to take confirmation, and if they did confirm, they could as formerly limit the amount of the estate confirmed to any extent they chose.

On 1st January 1824 two Statutes, both dated 19th July preceding, came into operation, by which important changes were effected. By the one all compositions in respect of confirmation and all fees termed consignation fee and sentence money were abolished.<sup>2</sup> By the other, caution in the case of executors-nominate was dispensed with, and in the case of executors-dative the Court granting confirmation

<sup>1</sup> 48 Geo. III. c. 149, §§ 38-42,      <sup>2</sup> 4 Geo. IV. c. 97, § 1.  
 Appendix III.

CHAP. VI. was authorised to fix the amount of caution to be found by them, not exceeding the amount confirmed,—and all persons requiring confirmation were bound to confirm the whole moveable estate of a deceased person known at the time to which they should make oath, except executors-creditors, who might continue to limit their confirmations to the amount of their debt,—it being provided that nothing contained in the Act should affect or alter the provision made with respect to special assignations by the Act of 1690, anent the confirmation of testaments.<sup>1</sup>

Except by  
creditors.

Special  
assigna-  
tions.

The Act of 1690 referred to declared “That where special assignations and dispositions are lawfully made by the defunct tho neither intimate nor made publick in his lifetime, they shall be yet good and valid rights and titles to possess, bruike, enjoye, pursue, or defend, albeit the soumes of money or goods therein contained be not confirmed, without prejudice alwayes to the competition of creditors and others, and of their rights and diligences as formerly before the making heirol.”<sup>2</sup> Under this provision it had become the general practice either to specify the different items of estate in the settlement of the deceased, or to make reference to an inventory, to be signed relative to the settlement, and containing the several items, and this was held to constitute a special assignation of each item and to supersede the necessity of confirmation as a title to recover.<sup>3</sup> By reserving the effect of this provision, therefore, special assignations continue to be a good title to possess and recover the subjects assigned, though not confirmed. But after the abolition of the imposts on the issue of confirmation which led executors to evade it by every possible expedient, special assignations in settlements either by

<sup>1</sup> 4 Geo. IV. c. 98, §§ 2, 3, 4, Appendix v.

<sup>2</sup> Scots Acts, 1690, c. 56, Appendix I.

<sup>3</sup> *Juridical Styles* of 1820, vol. ii. p. 433; Bell v. Willison, 13th Jan. 1831, 9 S. 266; Lyle v. Falconer, 2nd Dec. 1842, 5 D. 236.

specification in the deed itself or by reference to an inventory, gradually ceased, and are now unknown in practice. Settlements contain only a general conveyance of the estate, and when a title is required it is made up by confirmation. CHAP. VI.

While the inventory to be given up under the Act of 1808 was required to be a full and true inventory of the personal estate situated in Scotland *or elsewhere*, it was provided by § 41 that the duty charged upon the inventory should be deemed and taken to be charged and payable only in respect of the amount or value of such parts of the estate and effects therein mentioned as should be situated in Scotland, and it was only of such estate, as being within the jurisdiction of the Scottish Courts, that confirmation could be issued. Although estate elsewhere than in Scotland therefore required to be noted in the inventory, it was not included in the amount on which duty was paid and of which confirmation might be expedite. Estate in Scotland only confirmed.

But by the Confirmation and Probate Act 1858, it was made competent to include in the inventory of the personal estate and effects of any person who should have died domiciled in Scotland any personal estate or effects of the deceased situated in England or in Ireland, or both: provided that the person applying for confirmation should satisfy the Commissary and that the Commissary should by his interlocutor find that the deceased died domiciled in Scotland, which interlocutor should be conclusive evidence of the fact of domicile. The value of such personal estate and effects situated in England or Ireland respectively was required to be separately stated in such inventory, and the inventory impressed with a stamp corresponding to the entire value of the estate and effects included therein, wheresoever situated within the United Kingdom.<sup>1</sup> Estate in England and Ireland added.

But this section was amended by the Sheriff Court

<sup>1</sup> 21 and 22 Vict. c. 56, § 9, Appendix VIII.

CHAP. VI. (Scotland) Act, 1876, to the effect that "Where it shall be desired to include in the inventory of the personal estate of any person dying domiciled in Scotland personal estate situated in England or Ireland, it shall not be necessary to have a special proceeding before the Sheriff, with the view to his pronouncing therein an interlocutor finding that the deceased died domiciled in Scotland;" but, in place thereof, "that fact shall be set forth in the affidavit to the inventory," and its being so set forth shall have the same effect as the finding by the Commissary under the former Act.<sup>1</sup> Accordingly, where the Scotch domicile, though set forth in the affidavit to the inventory, appeared very doubtful, and a petition was presented for a finding as to domicile, and for warrant to include English estate in the confirmation, the warrant was granted, but the finding as to domicile refused as unnecessary, the executor's oath being considered as conclusive for the purpose of the application (Innes, 22nd Nov. 1887). But where any question of domicile arises affecting the jurisdiction of the Court, the validity of a will, the title of the executor, or the payment of stamp-duties, it is not held that the executor's oath precludes further inquiry, it being expressly provided by the Act of 1858, § 17, that the interlocutor of the Commissary—for which the executor's oath is now substituted—shall be evidence and have effect for the purposes of that Act only.<sup>2</sup>

Effect of  
these Acts.

The effect of the Act of 1858 as thus amended was that where an executor deponed in his oath to the inventory of a deceased person's estate, that the deceased died domiciled in Scotland, he was at liberty to include in such inventory and in the supervening confirmation any English or Irish estate which belonged to the deceased; and if he included any estate in England or Ireland, he had to include the

<sup>1</sup> 39 and 40 Vict. c. 70, § 41, Appendix xiv.

Ewing, 24th July 1885, 13 R. 11 H.L., *per* Lord Selborne.

<sup>2</sup> *Orr Ewing's Trustees v. Orr*

whole estate within the United Kingdom (§ 15). But it CHAP. VI.  
 was still competent, though the deceased may have died domiciled in Scotland, to limit the contents of the inventory to estate situated in Scotland; and if the deceased had estate in England or Ireland, to obtain probate or letters of administration in respect thereof, and pay the duty in these countries respectively. And where the deceased had died domiciled out of the United Kingdom, this was the only competent course. Where the deceased had died domiciled in England or Ireland, the Scotch estate might either be given up and confirmed separately, or included in a probate or letters of administration obtained in these countries respectively, and thereafter produced in the Sheriff Court of Edinburgh, and certified by the Commissary Clerk, under §§ 14 and 15 of the Statute as afterwards explained.<sup>1</sup>

By an Act of 6th August 1860, it was enacted that the inventory of the personal estate of a deceased "shall be stamped with duty according to the value of the property contained therein at the time it is sworn to, including the proceeds accrued thereon down to that time."<sup>2</sup> And under an opinion of Crown counsel, obtained by the Inland Revenue authorities, and dated 22nd January 1861, it was held to be sufficient, where the inventory is given up for confirmation as well as for payment of inventory duty, that the value of the estate should be set forth as at the date of the oath, and not also as at the date of the death, and that the statutory form of confirmation must be modified accordingly.<sup>1</sup>

By the Finance Act 1894,<sup>3</sup> the foregoing provisions have to a certain extent, as hereinafter specified, been superseded, and the obligations incumbent on executors in giving up an inventory greatly increased. By that Act also, inventory duty ceased to be chargeable, except in the case of

*Estate to be valued as at date of oath.*

*Finance Act of 1894.*

<sup>1</sup> See Chap. ix.

<sup>3</sup> 57 and 58 Vict. c. 30.

<sup>2</sup> 23 and 24 Vict. c. 80, § 5.

**CHAP. VI.** persons dying before its commencement (2nd August 1894), and there was substituted therefor a new and more comprehensive duty called estate duty, leviable, save as therein expressly provided for, not only on the property which had been subject to inventory and probate duty, but on all property, real and personal, settled and not settled, passing or deemed to pass on the death of any person dying after 1st August 1894. And it was made the duty of the executor in giving up his inventory to specify in appropriate accounts annexed thereto, all the property passing on the deceased's death liable to the new duty (§§ 1, 8 (3), 24).

**Personalty  
abroad.**

Personal property situated out of the United Kingdom, though always required to be set forth generally in an inventory, was exempt from inventory duty, but, being subject to legacy or succession duty where the deceased has died domiciled in the United Kingdom, it is also subject to estate duty (§ 2 (1) (2)); such property therefore must now be specified in detail, and the value thereof extended in the same manner as if it had been situated in the United Kingdom. Being, however, not within the jurisdiction of the Courts of this country, it cannot be included in the estate confirmed. It is set forth in the inventory merely that it may be included in the sum on which duty falls to be paid. When the deceased has not died domiciled in the United Kingdom, estate abroad must, as formerly, be stated in a note to the inventory, but particulars need not be given.

**Allowances  
on foreign  
personalty.**

Where duty is payable on property abroad, two deductions are competent—(1) where additional expense has been incurred in administering or realising the property on account of its being out of the United Kingdom, an allowance is made not exceeding 5 per cent. on the value of such property (§ 7 (3)); and (2) where any property situated in a foreign country (not a British possession) has paid any duty there, the amount of the duty will be allowed as a deduction from the value of the property (§ 7 (4)). In both cases the Com-

missioners of Inland Revenue must be satisfied that the allowance claimed is justified. Where the amount of these deductions has been ascertained when the inventory is given up, it may be competent to claim them in paying the duty on the inventory, but if not then claimed a return of any overpaid duty may be applied for on a corrective inventory.

Special provision is made in regard to property situated in British possessions as distinguished from foreign countries. Personalty in British possessions. Where any such property is subject to estate duty, and any death duty is payable thereon in the country where it is situated, the amount of the latter duty will be allowed as a deduction from the estate duty which may be payable in this country in respect of the same property on the same death (§ 20 (1)). But this provision takes effect only in regard to property in British possessions where reciprocal arrangements have been established, and to which it has been applied by Orders in Council (§ 20 (3)). A list of British possessions, to which the provision has been so applied, is given below.<sup>1</sup>

Formerly it was incompetent to include in an inventory, Executry in United Kingdom. for the purpose of paying duty thereon, any English or Irish estate, unless the deceased had died domiciled in Scotland; and a similar restriction as to payment of duty applied to any application for probate or letters of administration in England or Ireland. But now, in giving up an inventory in Scotland, or in applying for representation in England or Ireland, the whole executry estate, wheresoever situated, must be included, and duty may be competently paid thereon (6 (2), 8 (3)). There is, however, no corresponding extension

<sup>1</sup> Australia (South), Australia (Western), Bahama Islands, Barbados, Bermudas, British Columbia, British Guiana, Cape of Good Hope, Ceylon, Falkland Islands, Fiji, Gambia, Gibraltar, Gold Coast Colony, Hongkong, India (British) exclusive of Feudatory States, Jamaica, Labuan, Lagos, Leeward

Islands, Manitoba, Natal, New Brunswick, Newfoundland, New Zealand, Nova Scotia, Ontario, Quebec, Sierra Leone, Somers Island, Straits Settlements, Tasmania, Tobago, Trinidad, Victoria. The orders are of various dates but are all retrospective in their operation.

**CHAP. VI.** to the Courts of the three kingdoms of power to include the whole estate so given up in the title granted by them. It remains incompetent where the deceased has not died domiciled in Scotland to confirm any estate not situated there, and a grant of probate or administration in England or Ireland can only be made effective as a title to Scotch estate when the deceased has died domiciled in the country where the grant has been issued. Where the deceased has died domiciled furth of the United Kingdom with estate in more than one of the three countries to which a title is required, it is still necessary that the title be made up in the country where the property is situated. In such cases it has been held competent by the Inland Revenue for the executor instead of paying the whole duty when the first application for title is made, while setting forth the whole estate for the purposes of aggregation and fixing the rate as after explained, to reserve from the amount paid by him a proportion of the duty exigible on estate to which a title is required elsewhere in the United Kingdom, and pay the duty thereon, when such title is applied for. And a similar course may be adopted in any case where the deceased has left property in more than one of the three kingdoms, and it is considered convenient or desirable to have a separate title to the property in each. Where duty on the whole estate has been paid in England or Ireland and confirmation of the estate in Scotland is required the inventory given up is accepted with the sanction of the Stamp Office, if impressed with a duty paid stamp or on other evidence that the duty has been paid.

Payment  
of duty  
postponed.

Where the amount or value of any property falling to be included in an inventory has not been ascertained when the inventory is given up, such property may be set forth therein without having any value attached to it, with a note by the executor that when the value is ascertained he will give up an additional inventory and pay any further duty that may thereby be found exigible (§ 6 (3)). This provision

is in accordance with previous practice. Such an entry in an inventory does not entitle the executor who has confirmed it to uplift and discharge it until its true value has been given up and an eik to the confirmation obtained. CHAP. VI.

The estate duty payable on an interest in expectancy may be paid either along with the duty on the rest of the estate when the inventory is given up, or when the expectancy falls into possession (§ 7 (6)). In any case it may be included in the inventory, and valued, like all other property therein, as at the date of deceased's death, for the purpose of determining the rate of duty payable on the rest of the estate; but the proportion of duty applicable to the expectancy may be deducted from the amount then paid. As estate contained in an inventory must also be included in the confirmation, a complete title to intromit with or assign the expectancy may thus be obtained before any duty thereon has been paid. The estate duty on an expectancy may be commuted by the Commissioners of Inland Revenue at their discretion, on application made to them (§ 12); but where payment of duty is deferred until the expectancy falls into possession, the rate of duty payable thereon will be determined by its then value, added to the value of the rest of the estate as previously ascertained (7 (6) (b)). Interests in expectancy.

By the Act of 1894 (§ 15 (2)), the Treasury have power to remit the estate and other death duties leviable with respect to objects of national, scientific, or historic interest given or bequeathed for public purposes. And by the Finance Act of 1896 (§ 20) where such objects are settled so as to be enjoyed in kind by different persons in succession, they are to form an estate by itself, and are not to be charged with estate duty until they are actually sold or come into the possession of a person competent to dispose of them. The person selling them, or for whose benefit they are sold, or the person who becomes competent to dispose of them, is accountable for the duty. Such property will, if in full Objects of public interest.

CHAP. VI. possession of a testator or settler at his death, require to be included in the inventory of his personal estate, and in any confirmation following thereon. But if the property has been settled in terms of this section, or the duty thereon remitted, it will be excepted from aggregation. A separate schedule giving the particulars and value of the excepted property is required by the Inland Revenue.

Inland  
Revenue  
forms.

The old forms of inventory and oath have been superseded except in the case of persons who have died previous to 2nd August 1894, whose estates are still subject to inventory duty. Under powers conferred upon them by the Act of 1894 (§ 8 (14)), the Commissioners of Inland Revenue have issued a set of printed forms to give effect to the new requirements made upon executors. The inventory of personal estate and relative oath are still kept distinct, but there is appended thereto the form of a statement of all the property in respect whereof estate duty is payable, with accounts which the executor is required to fill up, and a separate deposition which he is required to make. Only the inventory and oath thereto are recorded in the Sheriff Court, the statement, with its deposition prefixed, being transmitted therewith to the Inland Revenue office.<sup>1</sup>

These Inland Revenue forms are readily obtainable by practitioners and the public from the Inland Revenue offices in Edinburgh, and throughout the country. All principal or original inventories are now prepared by filling up one of these forms in accordance with the instructions contained therein. The particular circumstances to which each of them is applicable will be found stated in the Appendix of FORMS 63.

Inventory  
limited to  
executory  
estate.

Although all kinds of property are subjected to estate duty, and accounts thereof must be appended to the executor's inventory, the estate to be included in the inventory itself consists, as it formerly did, of the personal or moveable estate belonging or due beneficially to the deceased at the

<sup>1</sup> Order of Court, Appendix xxvi.

time of his death. This alone is the estate which the executor, as such, is entitled and bound to administer, and which can be included in a confirmation. It is still, therefore, apart from the question of duty, a matter of importance as affecting the rights and responsibilities of the executor, to determine what is, and what is not, executry estate.

## EXECUTRY ESTATE.

Land and rights pertaining to land, including the minerals therein ; trees with their fruits, and natural grass, growing on the land ; houses, mills, and other buildings erected on and united to the land ; fixed engines, machinery, vessels, and other pertinents attached to land or buildings<sup>1</sup>—all these, whether held by a deceased as proprietor or as tenant, and bonds which expressly exclude executors, are heritable and not personal estate, and do not fall to be included in the inventory, but pictures on canvas inserted in a wall are moveable.<sup>2</sup> Previous to 1st January 1869, all money secured upon heritable property, and rights having a tract of future time without having any relation to a capital sum,<sup>3</sup> such as annuities, were also heritable, but are now personal to the extent after mentioned. All other estate, of whatever kind, is, as regards duty and confirmation, personal, including rents of heritable subjects, feu-duties, and ground-annuals, which have accrued or become payable. Minerals become personal when separated from the ground, timber when cut, and fruit when plucked ; but crops which are sown and planted annually, and plants and shrubs which

Personal  
estate  
quoad  
succession.

<sup>1</sup> Dowall v. Miln, 11th July 1874, 1 R. 1180 ; Brand's Tra. v. Brand's Tra., H.L., 16th Mar. 1876, 3 R. 16 ; Tod's Tra. v. Finlay, 30th Jan. 1872, 10 M. 422. *Vide* also Nisbet, etc., v. Mitchell-Innes, 20th Feb. 1880, 7 R. 575 ; M'Donald, etc., 15th Nov.

1882, 10 R. 172 ; Reid's Exrs. v. Reid, 28th Feb. 1890, 17 R. 519.

<sup>2</sup> Cochrane v. Stevenson, 18th July 1891, 18 R. 1208.

<sup>3</sup> But see Hill v. Hill, 21st Dec. 1872, 11 M. 247.

CHAP. VI. are being reared for sale in a nursery, are personal, even while growing and connected with the ground. Heritable property forming part of the assets of a Scotch copartnership is personal *quoad* the succession of the partners,<sup>1</sup> and that whether the property be situated in this country or abroad (Turner, 26th Jan. 1883). The price of lands sold or purchased, but not paid for, and the titles to which have not been completed before the deceased's death, and a sum directed by a testator to be invested in heritage or to pay off a heritable bond after his death, are also personal as regards duty and confirmation; but in the case of a property purchased, the price will be a debt due to the heir. A claim which was formerly competent on the part of the heir of line of a party deceased to certain articles of furniture and plenishing as heirship moveables, without confirmation, is now abolished.<sup>2</sup> By Statute, copyright is declared to be personal estate,<sup>3</sup> and patent rights are also declared personal.<sup>4</sup>

Heritable securities subjected to duty.

By two Acts, dated 3rd April and 6th August 1860,<sup>5</sup> all money secured on heritable property in Scotland, and all money secured by Scottish bonds and other instruments the rights to which should be taken excluding executors, constituting the succession or part of the succession of any person dying on or after 3rd April 1860, were made liable to inventory duty. And by the later Statute it was enacted that money secured upon heritable property by conveyance *ex facie* absolute, and money secured by adjudication when the right of reversion has not expired, and all money secured in any other way upon heritable property, should be subject

<sup>1</sup> *Minto v. Kirkpatrick*, 23rd May 1833, 11 S. 632; 53 and 54 Vict. c. 39, § 22.

<sup>2</sup> 31 and 32 Vict. c. 101, § 160.

<sup>3</sup> 5 and 6 Vict. c. 45, § 25.

<sup>4</sup> 15 and 16 Vict. c. 93, § 21; Advocate General v. Oswald, 20th

May 1848, 10 D. 969. As regards personal estate generally, see Erskine, 2 2; Bell's *Principles*, chap. x.; M'Laren on *Wills*, chap. x.

<sup>5</sup> 23 Vict. c. 15, § 6, and 23 and 24 Vict. c. 80, § 1.

to the provisions of both Statutes, provided always that CHAP. VI. nothing contained therein should be held to apply to feu-duties, or to other permanent periodical payments which are made a real burden upon land where payment of a capital sum of money is not thereby secured (§ 8). And the same Statute provided that these securities might either be given up for duty in a special inventory, in the form prescribed in the schedule appended to the Act, to be lodged with the Solicitor of Inland Revenue at Edinburgh (§ 3), or added to the inventory of personal estate (§ 4); and it also repealed the previous Statute, in so far as it had provided that such securities might be included in the estate and effects in respect of which probate and letters of administration might be obtained in England or Ireland (§ 9).

By the Titles to Land Consolidation Act 1868,<sup>1</sup> it was enacted, that from and after the commencement of the Act (1st January 1869), no heritable security granted or obtained either before or after that date should, in whatever terms the same might be conceived, except where executors should have been expressly excluded either in the security or by minute as provided by the Act, be heritable as regards the succession of the creditor in such security, but that the same should be moveable as regards the succession of such creditor, and should belong, after the death of such creditor, to his executors or representatives *in mobilibus*, in the same manner and to the same extent and effect as such security would, under the law and practice then in force, have belonged to the heirs of such creditor,—it being provided, however, that all heritable securities should continue heritable *quoad fiscum*, and as regards all rights of courtesy and terce competent to the husband or wife of any such creditor, and that no heritable security, whether granted before or after marriage, should to any extent pertain to the husband *jure mariti* where the same was conceived in favour of the wife, or to the wife

Heritable securities converted into personalty.

<sup>1</sup> 31 and 32 Vict. c. 101, § 117.

CHAP. VI. *jure relictæ* where the same was conceived in favour of the husband, unless the husband or relict had or should have right or interest therein otherwise; and further, that no heritable security should to any extent be held to be part of the creditor's moveable estate in computing the amount of the *legitim*. And by §§ 125, 126, and 127 of the Act, as amended by §§ 63 and 64 of the Conveyancing Act of 1874,<sup>1</sup> and relative schedules appended to the former Statute, provision is made for the executors-nominate, or executors-dative, as the case may be, duly confirmed, completing their title to such securities.<sup>2</sup>

Securities  
made per-  
sonal.

The heritable securities to which these sections apply are detailed in the interpretation clause of the Act, and include heritable bonds, bonds and dispositions in security, bonds of annualrent, and bonds of annuity, and all other forms of constituting securities over lands; except securities by way of ground-annual, and absolute dispositions qualified by back bonds or letters. And by § 30 of the Conveyancing Act of 1874, it is enacted that the provisions and enactments contained in § 117 of the Act of 1868 shall apply as nearly as may be to all real burdens upon land, with the exception of ground-annuals. Such burdens, therefore, are, with the exception named, also moveable as regards the succession of the creditor therein. According to the practice of the Inland Revenue and of the Commissary Courts, all such bonds, securities, and burdens, from which executors are not expressly excluded in terms of the Act, forming part of the succession of any deceased person, fall to be included in the inventory and confirmation of his personal estate, and, except as specially provided for in the Act, are held to be subject, as regards duties, debts, and distribution, to the same rules of law as other moveable succession. An opinion, however, was expressed by a majority of seven judges (*diss.* Lord Shand) that § 117 of the Act of 1868 makes heritable

<sup>1</sup> 37 and 38 Vict. c. 94.

<sup>2</sup> See Chap. IX.

securities moveable only in cases of intestate succession.<sup>1</sup> CHAP. VI.  
 But in a subsequent case where a truster directed her trustees to divide the residue of her "moveable means and estate" among certain persons, such estate was held to include heritable bonds not expressly excluding executors.<sup>2</sup>

Bonds whether heritable or personal expressly excluding executors, and securities by conveyance *ex facie* absolute qualified by back bond, though not personal as regards succession, are still subject to inventory duty under the Revenue Acts of 1860, where the deceased has died before 2nd August 1894, and may be either added to the inventory of personal estate or given up in a special inventory. But as under the Finance Act 1894, heritage of whatever kind of persons dying after its date is subject to estate duty, it would appear that such securities will now fall to be given up with other heritable property.

The share of a deceased person in a succession, in so far as it consists of moveables, falls to be included in his inventory as personal estate. Where the succession consists partly or wholly of heritage conveyed to trustees with a direction to sell the heritage and pay over the proceeds to the beneficiaries the interest of the beneficiaries will be personal whether conversion has taken place or not. But where there is a mere power of sale at the discretion of the trustees, and the exercise of the power is not indispensable to the execution of the trust, and the power has not been exercised at the death of the beneficiary, his share of the heritage, so far as unsold, will continue heritable as regards his succession; if the power has been exercised, in so far as conversion has been effected, his share of the proceeds will be personal.<sup>3</sup> Where the trustees on an estate consisting

<sup>1</sup> Hare, 25th Nov. 1889, 17 R. 105. See also Cunningham v. Cunningham, 30th Nov. 1889, 17 R. 218.

<sup>2</sup> Hughes' Trustees v. Corsane, 19th Dec. 1890, 18 R. 299.

<sup>3</sup> Aitken v. Munro, 6th July 1883, 10 R. 1097; Sheppard's Tr. v. Sheppard, 2nd July 1885, 12 R. 1193; Seton's Trs. v. Seton, 2nd July 1886, 13 R. 1047; Kippen's

CHAP. VI. originally of heritage and moveables, had realised the moveables and employed the proceeds in paying off debts on the heritage, on the death of a beneficiary before the period of division, it was held that his interest in the succession had become wholly heritable, and that no inventory duty was exigible thereon (Crosby, 2nd Feb. 1887). A judicial sale of heritage operates conversion and the price falls to the heirs *in mobilibus* of an absent proprietor who survives the sale.<sup>1</sup>

Rents of  
heritage.

By the common law the rents of heritable subjects for each year were held to be legally due in equal portions at Whitsunday and Martinmas, irrespective of the date of entry to the subjects, and to vest in the proprietor only as they became legally due. In the case of agricultural farms the entry to the lands was generally at Martinmas, or at the separation of the crop from the ground; and in the case of pastoral or grass farms at Whitsunday or in the spring; while to houses and urban subjects the entry was at the term of Whitsunday. The rent of land was held to be payable in respect of the crop of the year in which these terms occurred, and the rent of houses in respect of their occupation for the year from the date of entry. But in all cases, the first half of the year's rent was held to be legally due and to vest in the proprietor at Whitsunday, and the second half at Martinmas; so that on his death, only the rent which had vested and remained unpaid went to his executors. The actual term of payment was usually postponed. In the case of urban subjects the rent legally due at Whitsunday was generally payable at Martinmas, and the rent due at the latter term at the Whitsunday following;

Trustees, 20th March 1889, 16 R. 668; Brown's Trustees v. Brown, 4th Dec. 1890, 18 R. 185; Gilligan v. Gilligan, 15th January 1891, 18 R. 387; Anderson's Executor

v. Anderson's Trustees, 18th Jan. 1895, 22 R. 254; Sim v. Sim, 17th July 1895, 22 R. 921.

<sup>1</sup> Macfarlane v. Greig, 26th Feb. 1895, 22 R. 405.

and in the case of land payment was usually postponed to such terms as would allow the tenant time to realise the produce of his farm before being called on to pay his rent. But however long deferred might be the term of actual payment, the right to the rent was fixed at the term when it became legally due; and if the proprietor survived that term the rent then due went to his executors; if he predeceased it the whole went to the heir in heritage. If a rent was made payable before the term at which it became legally due, it was called a *forehand rent*, and vested in the proprietor at the date when it became payable; so that even where the proprietor predeceased the legal term of payment, if he survived the date at which the rent had been made payable, and it had not been paid, his executors were held entitled to claim the whole of it.<sup>1</sup>

By the Apportionment Act of 16th June 1834,<sup>2</sup> which dealt only with rents payable under leases or other instruments granted after its date, an increase was made in certain cases to the rent payable to the executors of deceased proprietors. After much litigation the result of the Act as affecting rents in Scotland was found to be, that it applied only to cases in which the deceased possessed merely a limited or terminable interest in the property, such as that of a *liferenter* or heir of entail, but not to the succession of a fee-simple proprietor; that it did not apply to rents of farms unless payable under executed instruments, and that entries in a rental book were not equivalent to such instruments; and that in the cases to which it did apply, in addition to the rent legally due at the term preceding the death of such *liferenters* or heirs, there fell to be paid to their representatives a proportion of rent corresponding to the period during which the deceased had

Apportionment Act  
of 1834.

<sup>1</sup> Erskine, 2. 9. 64; Hunter on *Landlord and Tenant*, i. 387; ii. 325; Bell on *Leases*, i. 475; M'Laren on *Wills*, chap. x. § 4; Rankine on *Leases*, chap. xv.

<sup>2</sup> 4 and 5 Will. iv. c. 22.

CHAP. VI. survived that term.<sup>1</sup> It was also held by the Inland Revenue that the rents of urban subjects continued in all cases to be exempt from apportionment, the rule laid down being, as regards house property, that the term's rents current at the death were personal, and this rule was adopted in practice.<sup>2</sup>

Apportionment Act  
of 1870.

By the Apportionment Act of 1st August 1870, it is enacted, that "from and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly;" but that "the provisions of this Act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place."<sup>3</sup> This Act has been held in practice to apply to all rents in which any deceased person had an interest, either as liferenter or as fee-simple proprietor, and whatever the nature of the subjects in respect of which the rent is exigible; and this practice appears to be sanctioned by the manner in which the Act has been interpreted by the Supreme Court in two cases.<sup>4</sup> In the first of these, in delivering the judgment of the Court, after quoting the Statute, the Lord President said:—"It is thus made matter of enactment that everything payable in the nature of income is to be considered as accruing from day to day, and as such apportionable. Everything of that kind growing due in the

<sup>1</sup> *Bridges v. Fordyce*, 7th March 1844, 6 D. 968; H.L., 23rd Feb. 1847, 6 Bell, 1; *Campbell v. Campbell*, 18th July, 1849, 11 D. 1426; *Blaikie v. Farquharson*, 18th July 1849, 11 D. 1456; *Baillie v. Lockhart*, 23rd April 1855, 18 D. (H.L.) 22; *Dalhousie v. Crockat*, 26th Mar. 1868, 6 M. 659; *Bannatine's Trs. v. Cunninghame*, 12th Jan. 1872, 10 M. 319.

<sup>2</sup> See Rankine on *Leases*, 327, note; *Alexander's Practice*, 11; also opinions of Judges in *Weir's Executors v. Durham*, 17th March 1870, 8 M. 725.

<sup>3</sup> 33 and 34 Vict. c. 35, §§ 2, 7.

<sup>4</sup> *Lord Herries v. Maxwell's Curator*, 6th Feb. 1873, 11 M. 396; *Learmonth v. Sinclair's Trustees*, 23rd Jan. 1878, 5 R. 548.

term during which a deceased party died is, therefore, CHAP. VI. apportionable between his heir and executor."

In applying the Apportionment Act to farm rents, where Apportionment of rents of land. the rent is due at the legal terms of Whitsunday and Martinmas in respect of the crop of the year in which these terms occur, and the deceased has survived Whitsunday, his executors have right to the first half of the rent of arable farms due at Whitsunday, and to a proportion of the second half due at Martinmas corresponding to the period of his survivance. If he survive Martinmas, his executors have right to the whole rent for the crop of that year, and to a proportion for the crop of the next year corresponding to the period that he survives Martinmas. Though the date of entry and the date of actual payment of the rent are generally different in grass farms from what they are in arable farms, the rent for the crop of each year vests at the same terms in both cases, and is apportioned in the same way. And the same rule applies to grass parks let for the whole year. But when grazings for the season are sold by auction, the whole rent has been held to vest in the proprietor at the date of sale (Brodie, 2nd Nov. 1888). The case of Herries above referred to was one in which the farms were let with entry to the houses, grass, and hay lands at Whitsunday, and to the lands under crop at the separation of the crop from the ground. It was held that the first half-year's rent which was payable at Martinmas after entry for the half-year preceding was a forehand rent, and payable not in respect of crop, but in respect of occupation, and to have begun to accrue from the date of entry, and therefore, that the executors of the deceased, who had died before Martinmas, were entitled to a proportion of the rent then payable down to the date of his death. It would appear that the rents of crofts and pendicles also begin to vest as from the term of entry, and the proportion of rent applicable to the period during which the proprietor survives that term so far as not received by

CHAP. VI. him in his lifetime, will go to his executors (Mathison, 26th May 1879).

Urban  
subjects.

The effect of the Apportionment Act as regards the rents of houses and other urban subjects, is that the legal terms of payment are practically disregarded. The rent being payable in respect of occupation is held to accrue from the term of entry, and to vest in the person having right to it only as it accrues. The possession for the year is usually from Whitsunday, and the rent is payable in equal portions at the Martinmas and Whitsunday following. Where the deceased has survived Whitsunday, therefore, his executors are held to have right, not to the whole of the first half of the year's rent, as formerly, but only to the proportion for the period from Whitsunday down to the date of his death. By the 4th section of the Act, the rents, though apportioned, are declared to be recoverable from the tenants by the same person as would formerly have been entitled to recover them; and the apportioned part not belonging to him, to be recoverable by the party entitled to it only from him. The executor, therefore, is entitled as before to give up and confirm the whole half-year's rents, claiming deduction of what does not belong to him beneficially as a debt; but the general practice is to give up and confirm only the proportion due to the deceased.

Mines,  
quarries,  
and fish-  
ings.

The rents of subjects, the profits of which arise from continued daily labour, as fishings, collieries, salt-works, appear to have always been considered to accrue from day to day, and to be apportionable accordingly. Where the rent is in the form of a royalty on the extent or produce of the workings, it would appear that the deceased's interest will be the amount actually earned at his death.<sup>1</sup> In regard to sporting leases there does not appear to be any distinct authority as to a division of rents according to terms.<sup>2</sup>

<sup>1</sup> Erskine, 2. 9. 66; M'Laren on ham, 17th March 1870, 8 M. 725.  
Wills, 400; Weir's Exrs. v. Dur-

<sup>2</sup> Rankine on Leases, 452-456.

Feu-duties, ground-annuals, interests on bonds and other securities excluding executors, all which formerly were held to vest only if the legal terms of payment had arrived, now fall to be apportioned in the same manner as rent. Termly payments arising from rights having a *tractum futuri temporis*, in so far as they may remain heritable, would be subject to the same rule, but bonds of annuity, which formerly fell under this description, are now personal *quoad* succession, and the whole interest under them accrues to the executors.

CHAP. VI.  
Feu-duties,  
etc.

Before the passing of the Married Women's Property Act on 18th July 1881,<sup>1</sup> the rents of a wife's heritable estate fell to her husband *jure mariti*, and it has been held that, notwithstanding the provisions of that Act, the *jus mariti* and right of administration of a husband are not excluded from the income of heritable estate the fee of which had vested in his wife prior to the passing of that Act.<sup>2</sup>

Rents of  
wife's heri-  
tage.

The Apportionment Act is applicable to all periodical payments of the nature of income, and will therefore regulate the share of interests and dividends falling to a liferenter of moveable as well as of heritable estate. A liferenter gets the interest or dividends on shares or stock, but not the bonuses, only the interest thereon.<sup>3</sup> Where shares have been sold during the currency of a term, the liferenter's interest may be not the proportion of the dividend actually earned at the close of the term, but a proportion of what the dividend was expected to be at the date of the sale.<sup>4</sup> In regard to dividends payable, not at the termination of the period during which they have been earned, but at a fixed date thereafter, the terms of the Statute and the analogy of rents seem to point to the proportion of the dividend that

Apportion-  
ment of  
dividends.

<sup>1</sup> 44 and 45 Vict. c. 21.

<sup>3</sup> M'Laren on *Wills*, 1056.

<sup>2</sup> *Scott's Trs. v. Scott*, 20th Feb. 1889, 16 R. 507.

<sup>4</sup> *Cameron's Factor v. Cameron*, 15th Oct. 1873, 1 R. 21.

CHAP. VI. has been earned down to the date of death, as falling to be included in the inventory either of a proprietor or life-renter, irrespective of any postponed periods of payment. There is, however, difference of opinion on this point, and the question has not been decided.

Stipend  
and Ann.

It has been decided that stipend and ann, whether payable out of the teinds, or, as in Edinburgh, in the form of a salary provided by Statute, are not affected by the Apportionment Act of 1870, but are still regulated by the Statute of 1672, c. 13, which enacts, "That in all cases hereafter, the ann shall be an half-year's rent of the benefice or stipend over and above what is due to the defunct for his incumbency, which is now settled to be thus, viz.,—If the incumbent survive Whitsunday, there shall belong to them for their incumbency the half of that year's stipend or benefice, and for the ann the other half; and if the incumbent survive Michaelmass, he shall have right to that whole year's rent for his incumbency, and for his ann shall have the half year's rent of the following year; and that the executors shall have right hereto without necessity or expenses of a confirmation."<sup>1</sup> The executors of a minister, therefore, have right only to the stipend due at the term of Whitsunday or Michaelmas immediately preceding his death, the stipend for the half-year current being ann, which does not form part of his executry or appear in the inventory or confirmation at all. And a surrender of stipend to an assistant carries only what has vested in the minister.<sup>2</sup>

Building  
Society  
Shares.

Shares in a Building Society are personalty, but in the event of their being advanced on the security of heritage the interest of the owner becomes entirely heritable, and on his death descends to his heir at law and not to his executors. But by the Building Societies Act 1874, § 30, as interpreted

<sup>1</sup> *Latta v. Edin. Eccles. Commrs.*,  
30th Nov. 1877, 5 R. 266.

<sup>2</sup> *Dow v. Imrie*, 15th July 1887,  
14 R. 928.

by § 6, it was enacted, that whenever a member of a society CHAP. VI. under the Act, having executed a mortgage, conveyance, or bond and disposition in security, to the society, shall die intestate, leaving an infant heir, or infant co-heiress, it shall be lawful for the said society, after selling the premises so mortgaged to them, to pay to the administrator or administratrix (executor-dative) of the deceased member, any money, to the amount of £150, which shall remain in the hands of the said society after paying the amount due to the society and the costs and expenses of the sale, without being required to pay the same into the Post Office Savings Bank, as provided by the Trustees' Relief Act, and the Acts amending or extending the same, the said sum of £150 to be considered as personal estate, and liable to duty accordingly<sup>1</sup> (Danvers, 28th May 1889).

Funds standing in a deceased's name as trustee or executor are not liable in duty, and cannot be confirmed. Funds held in trust by deceased. But where the deceased, besides being trustee or executor, has had also a beneficial interest in the estate standing in his name in that character,—to the extent of such interest it will fall to be included in the inventory, and may be confirmed. And where the deceased has intermixed the trust-funds with his own, so that they cannot be distinguished, or invested them in his own name absolutely, they may then be included in the inventory as *ex facie* belonging to the deceased beneficially; the right of the actual beneficiaries being held as a debt due by the deceased and the duty adjusted accordingly.

When the deceased has deposited or invested funds in the name of some other person, or in his own name jointly with Special destinations. that of some other person, so that on his death such person is entitled to uplift and take possession of the funds, it becomes necessary to determine whether such funds form part of the executry estate, or whether they belong absolutely to

<sup>1</sup> 37 and 38 Vict. c. 42.

CHAP. VI. the person in whose favour the title has been taken. Where  
 Special  
 destina-  
 tions. an assignation in security of a loan was taken by a husband in name of himself and his wife "equally between them, and to the survivor of them, and to the heirs, administrators, and assigns of the survivor," the money having belonged to the husband and the assignation being in his possession at his death,—the widow objected to the executor including the loan in the inventory of the husband's estate, and contended that it fell to her as her own absolute property at his death. But the Court decided that, though the fund fell to the wife under the special destination (which was held not to be revoked by a general settlement of later date<sup>1</sup>), it still formed part of the husband's executry estate; but the opinion was expressed that if the document had been delivered, it would have operated a transference of the fund in question with the security provided.<sup>2</sup> Following this judgment, it has since been decided that debentures, stock certificates, bonds, and certificates of debt issued by public companies, or trustees of public works, if taken with a special destination, will, on the death of the person who takes them, pass under that destination just as a heritable subject would pass if taken with a title in similar terms; but where the title is taken in such terms that the person who takes it can alter the destination at any time, and he retains the documents in his own custody, he will remain undivested until his death. Investments of the kind specified made by a father, where the title is taken in favour of himself and one of his children, and the survivor of them, will go to the child on the father's death, and the result will be the same where the title is taken in favour of the father in trust for the child. Investments by a husband where the title is taken to himself and his wife,

<sup>1</sup> Paterson's Judicial Factor v. Paterson's Trustees, 4th Feb. 1897, 24 R. 499, but see Brydon's Curator v. Brydon's Trustees, 8th Mar. 1898, 25 R. 708; Minto's Trs. v. Minto,

9th Nov. 1898, 1 F. 62; Currie v. M'Lennan, 3rd Mar. 1899, 1 F. 684.

<sup>2</sup> Walker's Executor v. Walker, 19th June 1878, 5 R. 965.

without any clause of survivorship, belong to them equally, CHAP. VI. and on the husband's predecease one half will go to his representatives and the other to his wife; but if such an investment is made in England, where survivorship is presumed, the whole will go to the wife.<sup>1</sup> In all these cases the destination operates *per se*, and gives a complete right to the contents of the document to the persons named.<sup>2</sup> But a sum in an ordinary bank deposit-receipt, payable on demand, taken in name of the depositor and another person, and the survivor of them, will not, on the depositor's death, accrue to the survivor unless he can prove by extrinsic evidence that it had been made over to him by donation either *inter vivos* or *mortis causa*. He may be entitled to uplift the money, but unless he can establish donation, he will be accountable for it to the deceased's representatives. And the same rule is applicable to sums in a bank pass-book.<sup>3</sup> The tendency of some of the decisions has been to narrow the amount of evidence necessary to prove donation in such cases, and it has even been suggested whether the distinction established by the older cases, between the effect of the same terms when used in a deposit-receipt, and in a more formal document, might not be reconsidered.<sup>4</sup> But an examination of the more recent cases noted below<sup>5</sup> shows that only in one of them

Special  
destina-  
tions.

Deposit-  
receipts.

<sup>1</sup> But see *Dinwoodie's Exr. v. Carruthers' Exr.*, 6th Dec. 1895, 23 R. 234, in which it was decided that the right to money deposited in England in joint names of two persons domiciled and resident in Scotland falls to be determined by the law of Scotland.

<sup>2</sup> *Buchan v. Porteous*, 13th Nov. 1879, 7 R. 211; *Connell's Trs.*, 16th July 1886, 13 R. 1175, and cases there quoted.

<sup>3</sup> *Jamieson v. McLeod*, 13th July 1880, 7 R. 1131; *Blyth, etc., v. Curle*, 20th Feb. 1885, 12 R. 674.

<sup>4</sup> *Martin's Trs.*, 22nd Jan. 1887,

S. L. R. 24, 484; *Macdonald v. Macdonald*, 11th June 1889, 16 R. 758.

<sup>5</sup> *McNicol v. McDougall*, 25th Oct. 1889, 17 R. 25; *Morrison v. Forbes*, 18th June 1890, 17 R. 958; *Dawson v. Mackenzie*, 8th Dec. 1891, 19 R. 261; *National Bank v. Cowan*, 18th Oct. 1893, 21 R. 4; *Dinwoodie v. Carruthers*, *supra*; *Macfarlane's Trs. v. Miller*, 20th July 1898, 25 R. 1201; *Rose v. Cameron's Executor*, 10th Jan. 1901, 3 F. 337; *Fraser v. Fraser and Ors.*, *Scotsman*, 18th May 1901.

CHAP. VI. (Macfarlane Trs. v. Miller) was the evidence held sufficient to prove donation. In that case it was held that there had been an effectual *mortis causa* donation of sums in deposit-receipts which bore that they had been received from the alleged donor and donee payable to either or survivor, and that although the receipts were in the possession of the donor at her death.

Effect of  
special  
destina-  
tions.

It would appear, therefore, that when the title to an investment has been taken by the deceased with a special destination, and delivered to the person in whose favour the destination is taken, it will operate an immediate and complete transfer to him on the death of the person to whom it belonged; if not delivered, the investment will fall to be considered as executry, and included in the inventory, but the executor will be bound to give effect to the destination by delivering the document to the beneficiary. Where the document of debt is an ordinary bank deposit-receipt or pass-book, whether delivered or not, and donation is not established, the executor will be bound to include it in the inventory and confirmation, and to call the surviving holder, if he has uplifted the money, to account for it. The difficulties which so often arise in the application of these rules, so far as the revenue is concerned, were obviated by the provisions of the Customs and Inland Revenue Acts 1881 and 1889, now embodied in the Finance Act 1894. All estate passing on the deceased's death is now liable to the same duty. The description of property, however, which these Acts subjected to duty, overlaps and includes estate which the Court has held to be executry, and which the executor is still bound to include in his inventory.

Debts or  
advances.

Where a deceased person has in his settlement directed his trustees to discharge a bond and assignation in his favour, or given them power to recover or discharge it in their option, the bond is held still to form a portion of his estate at his death (Scotland, 14th July 1876; Dalziel,

20th April 1880); and advances to children or other beneficiaries under a deceased's settlement fall to be included in his inventory when acknowledgments have been taken for them under which they would be recoverable as debts, but not where the testator has become divested without any title to recover during his lifetime, though he may have directed that the advances shall be imputed as payments to account of a legacy or share in the succession.

Where the onerous obligations in a marriage-contract have been evacuated, the estate conveyed by it reverts to the party to whom it originally belonged, and forms part of his or her executry estate<sup>1</sup>; though provisions by a wife in favour of her children by a former marriage have been held to be irrevocable.<sup>2</sup> But in a case where a provision was made by a wife in an antenuptial contract, that the property conveyed by her to her trustees and the patrimony of her father should, on the death of the surviving spouse, and in the event of there being no children of the marriage, be divided between her brother and sister, and she survived without children, it was held by the Lord Ordinary (Gifford) that she could recall said destination and test upon said property and patrimony,<sup>3</sup> and both were accordingly included in her inventory and confirmation (Jamieson, 1st March 1871). And in a similar case, where the wife had directed the trustees to convey the funds in their hands contributed by her, to her next of kin, share and share alike, but reserving a power of division and appointment, the Inland Revenue held that the whole of these funds fell to be included in her inventory (M'Gaan, 12th April 1883). Funds contributed by the wife under a marriage-contract, and failing children,

Reversionary interests under marriage contracts.

<sup>1</sup> *Cunninghame v. M'Leod*, 20th July 1841, 3 D. 1288; H.L., 13th Aug. 1846, 5 Bell, 210; *Ramsay v. Ramsay's Trs.*, 24th Nov. 1871, 10 M. 120; *Brown's Trs. v. Brown*, 18th July 1890, 17 R. 1174.

<sup>2</sup> *Mackie v. Gloag's Trs.*, H.L., 6th Mar. 1884, 11 R. 10; reversing C.S., 9th March 1883, 10 R. 746.

<sup>3</sup> Interlocutor dated 13th Dec. 1870, not reported.

CHAP. VI. at her disposal subject to her husband's liferent, are executry estate at her death under deduction of the value of the husband's interest (Bruce, 9th April 1877 ; Kellie, 3rd May 1889). Where, on a wife's death without issue, the whole funds conveyed by her to the marriage-contract trustees became executry estate, and a certain portion of them still remained in her own name untransferred, the trustees gave up an inventory of the whole, and expedite confirmation to the untransferred portion as executors-creditors (Begbie, 11th December 1889). When the value of the estate disposed in security of marriage-contract provisions is more than sufficient to meet them, the surplus is executry of the disposer (Clerk, 10th March 1868 ; Mathison, 26th May 1879).

Power of  
disposal.

By an Act dated 3rd April 1860, it was enacted that all the personal or moveable estate or effects which any person thereafter dying should have disposed of by will, under any authority enabling such person to dispose of the same as he or she should think fit, should be deemed to be the personal or moveable estate and effects of the person so dying, in respect of which the inventory of personal estate is exhibited and recorded in Scotland, or probate of a will, or letters of administration with the will annexed, granted in England or Ireland ; and the duty is made a charge on the property disposed of.<sup>1</sup> But the power must have been one of absolute disposal and not merely of division or apportionment. Such power of disposal, whether of a specified sum or of a sum within specified limits, may be effectually exercised by means of a general settlement or *mortis causa* disposition, though the disposition may not expressly bear to be in exercise of the power, and may not refer to it.<sup>2</sup> But the question whether the power has actually been exercised in

<sup>1</sup> 23 Vict. c. 15, §§ 4, 5.

<sup>2</sup> Smith v. Milne, 6th June 1826,  
4 S. 679 ; Hyslop v. Maxwell's Trs.,  
11th Feb. 1834, 12 S. 413 ; Grierson

v. Miller, 3rd July 1852, 14 D. 939 ;  
Cowan's Trs., 18th July 1872, S. L. R.  
9, 632 ; Buchanan's Trs. v. Whyte,  
H. L., 25th Feb. 1890, 17 R. 53.

such a deed is one of the intention of the maker, and depends upon all the circumstances of the case.<sup>1</sup> A holograph will, valid by the law of Scotland, though not by that of England, executed in England by a domiciled Englishwoman, has been held to be an effectual exercise of a power of disposal under a Scotch deed.<sup>2</sup> Where a power of disposal under a marriage-contract had been exercised, but its operation was contingent on an event which had not happened, and might not happen at all, a note was appended to the inventory, to the effect that an additional inventory would be given up should the exercise of the power become operative (Rennie, 15th March 1866). Where the person having the power of disposal of certain funds exercised it by a special writing directing the trustees who held the funds to divide them, the executors under her general settlement of same date, who in this case were the same persons as the trustees, included the funds in their inventory and confirmation (Wyllie, 19th March 1881). By the Finance Act 1894, funds over which the deceased had a power of disposal are subject to estate duty whether the power has been exercised or not, but only where the power has been exercised do they form executry estate.

A policy of insurance effected by a person on his own life, and taken payable to his "executors, administrators, and assignees," forms on his decease a part of his executry estate.<sup>3</sup> A policy effected by a husband on the life of his wife, and taken payable to her "heirs, executors, successors, and assignees," was, on her predecease, held to belong, not to the husband, but to the heirs *in mobilibus* of the wife,<sup>4</sup> and a similar policy, where the husband predeceased, having during his life used it as a fund of credit to obtain advances from the insurance company, was held in a competition between his testamentary trustees and the widow to belong

Insurance policies.

<sup>1</sup> Mackenzie v. Gillanders, 19th June 1874, 1 R. 1050.

<sup>3</sup> Muirhead v. Muirhead's Factor, 6th Dec. 1867, 6 M. 95.

<sup>2</sup> Kennion v. Buchan's Trs., 7th Feb. 1880, 7 R. 570.

<sup>4</sup> Smith v. Kerr and Others, 5th June 1869, 7 M. 863.

CHAP. VI. to her.<sup>1</sup> Where, however, a policy was taken by a husband on his wife's life, payable to certain parties as trustees for him, and to "their executors, administrators, or assigns," it was held, on the death of the husband, who predeceased his wife, to form part of his estate.<sup>2</sup> And where policies were taken upon a son's life by a father, for behoof of himself and spouse, and payable to both, "or to the survivor of them, their, his, or her heirs, executors, or assignees," and from a mutual settlement between the spouses it was evident that the policies were intended neither as a donation nor a provision to the wife, but for the benefit of the son and his family,—it was held that, on the death of the father, who was the first deceiver, the policies formed part of his moveable estate, according to their actuarial value at that date.<sup>3</sup> "It is immaterial who pays the premium, or on whose life the policy is taken. The material point is, in favour of whom is the beneficial obligation undertaken by the company or society."<sup>4</sup> In accordance with the principle of these decisions, where a widow had effected a policy on her own life in favour of her son, and paid the premiums, the policy was not included in her inventory, and was paid to the son without confirmation (Ferne, 7th Sept. 1870); and a policy taken by a wife on her husband's life, and payable to herself, was also held not to form part of the husband's executry estate, and was paid without confirmation (Grant, 2nd May 1872).

Policies for  
wife and  
children.

A policy effected by a husband on his own life for behoof of his wife under the Married Women's Policies of Insurance Act 1880,<sup>5</sup> may be surrendered at any time by the husband as trustee with concurrence of the wife;<sup>6</sup> and in so deciding, an opinion was expressed that it may be surrendered without

<sup>1</sup> Thomson's Trs. v. Thomson, 9th July 1879, 6 R. 1227.

<sup>2</sup> Pringle's Trs. v. Hamilton, 15th March 1872, 10 M. 621.

<sup>3</sup> Chalmers' Trs., 16th March 1882, 9 R. 743.

<sup>4</sup> Lord Moncreiff, in Thomson's Trs. v. Thomson, *supra*.

<sup>5</sup> 43 and 44 Vict. c. 26, § 2.

<sup>6</sup> Schumann v. Scottish Widows' Fund, 5th March 1886, 13 R. 678.

such concurrence, unless the insurance company have notice CHAP. VI.  
of any intended breach of trust.<sup>1</sup> And a policy taken by a husband on his own life in favour of trustees for behoof of his wife and the children of the marriage does not confer a vested right in the beneficiaries without delivery, actual or constructive, of the policy; the same rule being applicable to such a policy as to other investments taken with a special destination<sup>2</sup> (page 144). It would appear from these the most recent deliverances on the subject by the Supreme Court, that where a husband effects a policy on his own life under the Married Women's Policies of Insurance Act, or in any other manner for the benefit of his wife or children, and retains the policy in his own custody and within his own power, so that he can alter the destination or dispose of the policy as he may think fit, he will remain undivested, and on his death the policy will fall to be included in his inventory and confirmation, though his executors will be bound to give effect to the destination as it then stands.<sup>3</sup> Where it is held that the policy has been delivered, and the husband divested, it will not form part of his estate; but should the wife predecease him, it may revert to him, as having been a provision by him in her favour under the implied condition of her survivance.<sup>4</sup>

Where the nature of the insurance is such that the person whose life is insured, and by whom the policy is maintained, has no power to dispose of its contents, it is held to form no part of his executry estate. On this ground, a policy of insurance on the life of a teacher in an hospital, the governors of which reserved to themselves the right of disposing of it as they thought proper (Wilson, 8th April 1863),—a sum falling due from the "Fund for Ministers' and Professors' Widows" (Wallace, 20th Dec. 1866),—the deceased's interest in "The Protestant Union of London," divisible by

Policies  
not execu-  
try estate.

<sup>1</sup> *Per* Lord Shand.

Nov. 1895, 23 R. 146, S.L.R. 33, 89.

<sup>2</sup> *Jarvie's Tr. v. Jarvie's Trs.*, 28th Jan. 1887, 14 R. 411.

<sup>4</sup> *Craig v. Galloway*, 17th July 1861, H.L., 4 Macq. 267, 23 D. 12.

<sup>3</sup> *Kennedy's Trs. v. Sharpe*, 21st

CHAP. VI. him only among his children (Watson, 2nd Jan. 1879),—  
 and a sum due the representatives of the deceased by the  
 “Customs Annuity and Benevolent Fund,”<sup>1</sup>—were held  
 exempt from duty, and payable without confirmation, though  
 all now subject to estate duty under the Finance Act 1894.

Policies  
 exempt  
 from duty.

By the Revenue Act of 1889 it was provided that  
 where a policy of life assurance had been effected with any  
 insurance company by a person who should die domiciled  
 elsewhere than in the United Kingdom, the production of a  
 grant of representation from a Court in the United Kingdom  
 should not be necessary to establish the right to receive the  
 money payable in respect of such policy.<sup>2</sup> The effect of  
 this provision in England and Ireland was that the policies  
 specified in it were exempted from the duty payable upon  
 probates and letters of administration, and the Board of  
 Inland Revenue adopted the view that such policies must  
 also be held to be exempted from the duty payable upon  
 inventories in Scotland. But it is held that such policies  
 are not exempt from the new estate duty, and fall to be  
 included in the inventory upon which it is payable.

Friendly &  
 Provident  
 Society and  
 Savings  
 Bank  
 funds.

By the Savings Bank Act 1887, the Industrial and  
 Provident Societies Act 1893, and the Friendly Societies  
 Act 1896, provision is made for the payment of sums under  
 £100 to the nominee or, in case of intestacy, to the repre-  
 sentatives of the deceased without confirmation. In all cases  
 care has to be taken that the interests of the Revenue are  
 protected where the whole estate exceeds that sum, and it is  
 declared that all payments made under the provisions of these  
 Acts shall be valid and effectual against any demand made  
 by any other person. But it does not appear that such pay-  
 ments are exclusive of the claims of other beneficiaries. The  
 last quoted Statute (§ 60) expressly enacts that the next of  
 kin or lawful representative of the deceased shall have

Tilsley's *Stamp Laws* (2nd ed.),      <sup>2</sup> 52 and 53 Vict. c. 42, § 19.  
 684.

remedy for recovery of the money so paid as aforesaid CHAP. VI.  
 against the person who has received that money. The  
 result seems to be that such money must be held to form  
 part of the proper personal estate of the deceased, and will  
 fall to be included in the inventory of his estate should an  
 inventory be given up. Confirmation though not necessary  
 as a title to uplift such money from the Society or Bank  
 will be a good title to call the payee to account for it.

The character of any estate as being personal or heritable English  
mortgages  
and lease-  
holds.  
 depends upon the law of the place where the property is  
 situated.<sup>1</sup> Thus, English mortgages or bonds over heri-  
 tage being held in England personal *quoad* succession were  
 always included in an inventory, though the law of Scotland  
 was assimilated to that of England in this respect only in  
 1868. In England also all leases and terms of lands, tene-  
 ments, and hereditaments go not to the heir but to the  
 executor or administrator.<sup>2</sup> The interest of executors there-  
 fore in property held by a deceased on a leasehold tenure is  
 not limited to the accrued rents, but extends to the whole  
 rents to become due during the unexpired portion of the  
 lease, subject of course to the conditions and obligations  
 under which the lease is held and the mortgages with which  
 it may be burdened.

Estate in the Channel Islands and the Isle of Man not Channel  
Islands.  
 being within the jurisdiction of either the English or Irish  
 Courts, always falls to be given up as estate abroad, but  
 where the deceased has died domiciled in the United  
 Kingdom is now under the Finance Act 1894 liable in  
 estate duty to the same extent as other foreign property.

#### LOCALITY OF ESTATE.

Corporeal moveables, such as cash or bank-notes, jewellery,  
 furniture, stock in trade, live stock, implements of trade and

<sup>1</sup> *Monteith v. Monteith's Trs.*,  
 29th June 1882, 9 R. 982.

<sup>2</sup> Williams on *Executors*, 595.

CHAP. VI. husbandry, and the like, belonging to an individual, are  
Locality of clearly estate where they happen to be at the time of his  
estate. death. Thus, where a Scotchman dies furth of Scotland, the money and effects he may have had with him do not fall to be included in the inventory and confirmation as Scotch estate. In regard to other kinds of personal property, there have been a number of decisions in the English Courts in questions of probate duty which appear to be applicable in questions relating to the contents of an inventory. From these decisions, and the opinions of the judges in pronouncing them, the following rules appear to be established :—Simple contract debts are assets where the debtor resides at the time of the creditor's death. Bills of exchange and promissory notes do not alter the nature of simple contract debts, but are merely evidences of title ; and, therefore, the debts due on these instruments are assets where the debtor lives, and not where the instrument is found. Foreign bills of exchange, however, payable to order, which are well known to be the subject of commerce, and to be usually sold on the Exchange, if in this country at the owner's death, are assets here, which are liable in duty, and may be included in a confirmation. But debts due from persons resident abroad, and shares or interests in foreign funds payable abroad, and incapable of being transferred here, are not estate within the jurisdiction of the Courts of this country, and no title can be granted to uplift them by these Courts. It has been expressly decided that goods in the hands of a deceased's agents in America, and debts due to him from persons there, and French Rentes, and American Stock, being part of the national debt of France and America respectively, and transferable there only, were not assets locally situated here. But if the certificates of these or other foreign stock are granted specially payable to bearer, and the certificates are here, they will be held to be estate in this country. For it has also been decided that Russian, Dutch, and Danish bonds,

the dividends on the Dutch bonds being payable in Amsterdam, and those on the other bonds in London, but the bonds themselves being saleable and transferable by delivery merely, and it being unnecessary for the holder to do any act out of the United Kingdom in order to render the transfer valid, were instruments in the nature of valuable chattels; and that where instruments of this nature are created—instruments capable of being transferred by acts done here and sold for money here, which any banker or other custodian might refuse to deliver to an executor unless he had made up a title to them—they must be regarded, if locally situated in this country at the deceased's death, as assets within the jurisdiction of the Courts of this country, and liable to duty according to their value in the market.<sup>1</sup> In effect, therefore, all bonds payable to bearer and other documents of debt, the mere possession of which gives a right to demand payment, and the title to which can be completed by delivery, are estate wherever the documents are deposited at the owner's death. And where a transfer is necessary to complete the title, if the title can be completed by registration of the transfer in the United Kingdom, the property is held to be estate where the transfer is registered. By the Companies (Colonial Registers) Act 1883<sup>2</sup>—which gives power to companies registered under the Companies Acts to keep colonial registers—it was enacted, that “Upon the death of a member registered in a colonial register under this Act, the share or other interest of the deceased member shall for the purposes of this Act, so far as relates to British duties, be deemed to be part of his estate and effects situated in the United Kingdom for or in respect of which probate or letters of administration is or are to be granted, or whereof an inventory is to be exhibited and recorded, in like manner as

Companies  
(Colonial  
Registers)  
Act.

<sup>1</sup> See Tilsley on *The Stamp Laws* *Executors*, 542-547, and cases quoted by these authors.  
<sup>2</sup> 46 and 47 Vict. c. 30, § 3 (7) (b).

(2nd ed.), 600-604; Hanson on *Probate Acts*, 158-160; Williams on

CHAP. VI. if he were registered in the register of members kept at the  
 Amended. registered office of the company." But by the Revenue Act  
 1889, the share or other interest of a deceased member  
 registered in a colonial register who shall have died domiciled  
 elsewhere than in the United Kingdom is exempted from the  
 operation of this enactment.<sup>1</sup> If the shares are registered in  
 this country the exemption will not apply (English, 13th  
 Dec. 1889), but a title must be made up here and estate  
 duty paid.<sup>2</sup>

Scotch  
 securities.

Money secured on heritage in Scotland is always given up  
 and confirmed as Scotch estate, though the granter of the  
 bond or other debtor may be resident in England or abroad.  
 Where the granter is resident in England, and it is desired  
 to obtain a title against him in respect of the personal  
 obligation contained in the bond, a separate entry at a  
 nominal value may be made and confirmed under the head  
 of English estate. Any personal estate realisable in Scotland,  
 assigned in security of a debt, may also be given up and  
 confirmed though the debtor is abroad. Where in an  
 original inventory a debt had been mentioned as estate  
 abroad, the debtor being in Norway, on his death, while the  
 debt was unpaid, a Scotch policy of insurance on his life,  
 which had been assigned in security of the debt, was given  
 up in an additional inventory and confirmed as Scotch  
 estate (Street, 22nd December 1886). The practice in  
 Scotland seems to differ from the rule which prevails in  
 England in regard to mortgage debts. Mr. Hanson states  
 that the locality of such a debt is regulated by the same  
 rules as apply to other debts, and does not in any way  
 depend upon the situation of the property comprised in the  
 mortgage.<sup>3</sup>

Ships.

By an Act of 25th July 1864 it was enacted that probate  
 and inventory duties "shall be charged and paid in respect

<sup>1</sup> 52 and 53 Vict. c. 42, § 18.

eries Company (1899), A.C. p. 71.

<sup>2</sup> Att. Gen. v. New York Brew-

<sup>3</sup> Hanson on *Probate Acts*, 160.

of the value of any ship or any share of a ship belonging to any deceased person which shall be registered at any port in the United Kingdom, notwithstanding such ship at the time of the death of the testator or intestate may have been at sea or elsewhere out of the United Kingdom, and for the purpose of charging the said duties, such ship shall be deemed to have been at the time aforesaid in the port at which she may be registered.”<sup>1</sup> This enactment will apply also to estate duty. It is simply declaratory of the law already existing, according to which, ships registered at any port in the United Kingdom could be transferred by bill of sale in this country, wherever they might be at the time. It does not follow that the cargo will be estate where the ship is registered ; but where the bills of lading are in this country, they are held liable in duty on the same principle as foreign bills of exchange payable to order.<sup>2</sup>

CHAP. VI.

Cargoes.

In England it would appear that personal property of any kind, which at the time of the death of the owner is *in transitu* to that country, and property belonging to a British subject on the high seas, were liable to probate duty.<sup>3</sup> In Scotland it was always the practice to hold, in terms of the Statute by which inventory duty was imposed, that it was payable only in respect of the amount or value of such parts of the estate and effects as should be situated in Scotland.<sup>4</sup> But where estate has been transmitted to this country after the owner's death confirmation may be necessary in order to obtain possession of it. And it would appear that confirmation would be a good title to receive and discharge such estate. Where the deceased died domiciled in England, and certain funds in Scotland had been transmitted to England after the death, and uplifted by the English administrator, it was held that the debtors in Scotland were

Estate in transitu.

Transmitted after death.

<sup>1</sup> 27 and 28 Vict. c. 56, § 4.<sup>3</sup> Hanson, *ut supra*, 162.<sup>2</sup> Hanson on the *Probate Acts*,<sup>4</sup> 48 Geo. III. c. 149, § 41.

CHAP. VI. not liable in second payment to a person who had been confirmed executor-creditor in Scotland.<sup>1</sup> Where a sailor had died at Marseilles, and his effects had been sold and the proceeds transmitted to this country, and placed, along with the wages due by the owners of the ship in Scotland, in the hands of the Mercantile Marine Board at Greenock, the whole were included in the inventory and confirmed (Taylor, 19th Mar. 1873); and where the deceased had been an engineer on board a steamship trading from Singapore, and had died at Celebes with no estate in this country at the time, and the whole contents of the inventory confirmed consisted of a sum of money and some personal effects which had been transmitted to the superintendent of the Mercantile Marine Board at Glasgow, the inventory was duly stamped in the first instance and application afterwards made for return of the duty, which was granted (Shearer, 1st June 1883). Funds realised through the Administrator-General in India, and transmitted to the India Office in London were held payable on production of a probate or of a confirmation sealed in the Probate Court, though not included in the sum confirmed.

Indian  
promissory  
notes.

By the Act of 23rd March 1860, it was enacted, that "all Indian Government promissory notes and certificates issued or stock created in lieu thereof, being assets of a deceased person, the interest whereon or in respect of which shall be payable in London by drafts payable in India, and which at the decease of the owner thereof shall have been registered in the books of the Secretary of State in Council in London, or in the books of the governor and company of the Bank of England, or shall have been enfaced in India for the purpose of being so registered before the decease of the owner thereof, and all Indian Government promissory notes issued with coupons attached, which, under such regulations and conditions as may be determined from time

<sup>1</sup> *Hutchison & Co. v. Aberdeen Banking Co.*, 9th June 1837, 15 S. 1100.

to time by the Secretary of State in Council, shall be so registered, and all certificates issued, or stock created in lieu thereof, shall be deemed and taken to be personal estate and *bona notabilia* of such deceased person in England, and probate or letters of administration in England, or confirmation granted in Scotland, and sealed with the seal of the principal Court of Probate in England, in pursuance of the provisions of the 'Confirmation and Probate Act, 1858,' shall be valid and sufficient to constitute the persons therein named the legal personal representatives of the deceased with respect to such notes and moneys as aforesaid." <sup>1</sup>

The locality of funds held in trust for a deceased, or of trust estate of which a deceased person may have right to a share, would appear to be not the country where the funds are invested, but that to whose jurisdiction the trustees are subject.<sup>2</sup> And the fact that confirmation of an estate has been taken out in the Sheriff Court of the deceased's domicile does not of itself subject the executors to the jurisdiction of that Court.<sup>3</sup> But a trustee under a Scotch trust, though resident in England, has been held subject to the jurisdiction of the Scotch Courts.<sup>4</sup> Shares in the Bank of Bengal standing in the name of trustees all resident in this country, and held by them for behoof of a deceased, were given up and confirmed as estate in Scotland (Cheape, 25th April 1887).

The interest of a deceased partner is held to be estate situated at the place where the business is carried on, or, where the firm conducts business in different countries, then at the place where it has its principal establishment, and that although foreign property and foreign debts may be

<sup>1</sup> 23 Vict. c. 5, § 1.

<sup>2</sup> *Orr-Ewing's Trs. v. Orr-Ewing*, H.L., 24th July 1885, 13 R. 1.

<sup>3</sup> *Halliday's Exr. v. Halliday's Exrs.*, 17th Dec. 1886, 14 R. 251.

<sup>4</sup> *Kennedy v. Kennedy*, 9th Dec. 1884, 12 R. 275; *Robertson's Trustee v. Nicholson*, 13th July 1888, 15 R. 914.

CHAP. VI. included in its assets.<sup>1</sup> The legal interest in the partnership property vests in the surviving partner, who is liable to account for and pay to the representatives of the deceased partner the amount which may ultimately appear due to him after the assets have been realised and the partnership debts discharged ; and this liability is in the nature of a personal debt, and situate, like other debts, where the debtor resides.<sup>2</sup> It is usual, therefore, where the deceased is a member of a firm and there are surviving partners, to set forth in the inventory his interest in the concern in one sum as a debt against the firm instead of giving in detail the whole assets and debts under their several headings, and confirming the gross amount, which would be necessary if he had carried on business as an individual, or if he had been the sole partner of the concern.

Deposits.

Though a bank or investment company may have branches in several countries, the interest of its proprietors is held to be centred at its head office ; but sums deposited with such banks or companies are generally held to be estate at the place where the deposit is made and payable. In the event of liquidation, however, it would appear that a title must be made up in the Courts of the country where the head office is.<sup>3</sup> In some cases, a deposit made with a British bank at one of its branches abroad has by arrangement been held to be payable in this country and included in an inventory and confirmation ; and English insurance companies having branch offices or agencies in Scotland generally agree to hold the policies which have been taken out in Scotland payable there on being confirmed as estate in Scotland, though in their case also, in the event of liquidation, an English title is insisted on.

Insur-  
ances.

Govern-  
ment  
funds.

Investments in consols and other Government funds forming part of the national debt of the United Kingdom, which

<sup>1</sup> Lord Advocate *v.* Laidlay's Trs.,  
H.L., 7th August 1890, 17 R. 67 ;  
Reversing Court of Session, 12th

July 1889, 16 R. 959.

<sup>2</sup> Hanson on the *Probate Acts*, 161.

<sup>3</sup> *Ibid.*

is under the management of the Bank of England, are held CHAP. VI.  
to be English estate, but such investments, when made  
through a Scottish Trustees Savings Bank, are included in  
an inventory and confirmed as Scotch estate.

Under various Statutes—the Regimental Debts Act 1893,<sup>1</sup> Govern-  
ment de-  
partments.  
the Navy and Marines (Property of Deceased) Act 1865,<sup>2</sup>  
and an Act passed on 31st July 1868<sup>3</sup>—arrears of pay or  
pension under £100 may be paid to the representatives of a  
deceased person by any public department without requir-  
ing any strict legal title, and where a title is required,  
confirmation without the seal of the Probate Court is gener-  
ally accepted. Money belonging to a deceased depositor in Post Office  
Savings  
Bank.  
the Post Office Savings Bank is payable to his representatives  
either on a Scotch or English title, without regard to where  
the money may have been deposited. Where the deceased  
depositor died in Paris domiciled in England, and the funds  
had been deposited at various places in England and Scot-  
land, the whole were given up and confirmed as estate in  
Scotland, where the executor happened to be residing, and  
the title was accepted by the Post Office and the money paid  
without question (Martinette, 22nd Feb. 1879). Under the Regimen-  
tal Debts  
Act.  
Regimental Debts Act above mentioned, the surplus only of  
the personal property of an officer or soldier dying on service,  
remaining over after payment of the preferential charges  
specified in the Act, is to be considered personal estate of  
the deceased with reference both to duty and title (§ 3); and  
such surplus, wherever the death may have occurred, may be  
remitted to the Secretary of State for War, for distribution  
in terms of the Statute.

### VALUATION OF ESTATE.

In the case of persons dying before 2nd August 1894,  
the executry estate, for the purpose of inventory duty, was,

<sup>1</sup> 56 Vict. c. 5.

<sup>3</sup> 31 and 32 Vict. c. 90, § 12.

<sup>2</sup> 28 and 29 Vict. c. 111.

CHAP. VI. and still is, valued as at the date of the oath to the inventory, including the interest, profits, and proceeds accrued thereon from the date of death.<sup>1</sup> But under the Finance Act of 1894, the whole property subject to the new estate duty is to be valued as at the date of death, and interest on the duty is chargeable from that date to the date of payment.

Corporeal  
moveables.

The value of household furniture, plenishing, silver-plate, pictures, and books ; of stock-in-trade, moveable machinery, and working plant ; of farm stock, crop, and implements of husbandry ; and of other moveable effects of a like nature, is generally instructed by the valuation of a licensed appraiser. An appraisalment or valuation of property of a deceased person, made for the information of an executor or other person required to record in any Commissary Court in Scotland an inventory of the estate of such deceased person, is exempt from stamp duty.<sup>2</sup> Where the effects are of small amount, an appraiser's valuation may be dispensed with, and the executor's own estimate of the value may be accepted. Where the effects have been sold, the price received will be taken as their value. Though the household furniture and plenishing of a deceased may have been conveyed to his surviving wife by antenuptial contract of marriage, the value of it must be included in the inventory, it being still *in bonis* of the deceased at his death (Lorimer, 24th April 1865).

Invest-  
ments and  
interest.

Government stock and stocks and shares in public companies are valued at the market price of the day. This price includes the proportion of current interest or dividend, but if any interest or dividend had been declared and remained unpaid at the date of the death, it will require to be added. The price of the day is ascertained from the published lists of the Stock Exchange. Where there have been no sales on any particular date, the price will be intermediate between that of sellers and buyers, or between the last and the next

<sup>1</sup> 23 and 24 Vict. c. 80, § 5.

<sup>2</sup> 54 and 55 Vict. c. 39.

sale. Where there are no public quotations, the value may be ascertained from the secretary of the company, or an experienced broker. Debts due on bond, bill, or other obligation bearing interest, will require to have added to their value any arrears of interest, with the current interest down to the date of death. The interest due on bonds and other securities excluding executors to date of death is personal, and must be included under the head of personal estate. CHAP. VI

Where the date of payment of an asset, such as a policy of insurance or bill, has not arrived, interest may be deducted to the date when payment is due. A policy of insurance held by the deceased on the life of another person who survives is given up at the surrender value. Where a legacy or share of a succession is subject to a liferent, the value of the liferent may be deducted. Continuing payments under bonds of annuity, bonds of annual-rent, and real burdens which are personal *quoad* succession, are capitalised, and the capital value included in the inventory. Liferents and annuities may be valued according to the Table appended to the Succession Duty Act.<sup>1</sup> Payments not due.

Contingent and reversionary interests may be given up at their present actuarial value. Where a merely nominal or interim value is attached to an entry in an inventory, the proper duty will be payable when the true value is ascertained, and the amount on which duty will be payable may not be the amount ultimately realised, but a fair estimate of the value of the expectancy at the time the inventory was given up.<sup>2</sup> But an interest in a Tontine fund which had been omitted from the inventories of several parties successively entitled thereto, or to a share thereof, and which ultimately, being the surviving interest, embraced the whole fund, was found liable in inventory duty on each transmis- Contingent interests.

<sup>1</sup> 16 and 17 Vict. c. 51, Appendix XIX.

<sup>2</sup> Lord Advocate v. Pringle, 12th June 1878, 5 R. 912.

CHAP. VI. sion, according to its value as finally ascertained.<sup>1</sup> No additional duty is payable in respect of any increase in the value of an item subsequent to its being given up in an inventory and the duty paid, if given up at what was a fair valuation at the time. On the other hand, no return of duty can be claimed in respect of the depreciation of stock in a public company which has been valued in the inventory at the market price of the day, even though it should ultimately prove to be worthless; but calls in respect of such stock made by liquidators after the holder's death, may be held to be debts due by the deceased in respect of which repayment of duty falls to be made.<sup>2</sup>

Goodwill. The goodwill of a trading business is an asset of the deceased, and will be valued at the price obtained for it, or which might be obtained for it, in the open market.<sup>3</sup> But where the stock in trade and moveable plant and machinery in connection with a pottery belonging to a deceased had been sold along with the pottery itself as a going concern, it was held that, apart from the enhanced price which the subjects, both heritable and moveable, brought in consequence of being sold in this way, there was no separate value attributable to the goodwill of the business.<sup>4</sup> The goodwill of a public-house is held by the Inland Revenue to be executry estate, and subject to duty as such.<sup>5</sup> Where a medical practitioner by his settlement directed his executor to sell his practice for the benefit of his widow and universal legatory, and it was sold accordingly, but the price received not included in the inventory and confirmation, it was decided in a question with a creditor of the deceased, that the sum was not

<sup>1</sup> Lord Advocate v. Findlay, 14th Aug. 1890 (Outer House, Lord Well-wood. Not reported).

<sup>2</sup> Galletly's Trs. v. Lord Advocate, 12th Nov. 1880, 8 R. 74.

<sup>3</sup> Donald v. Hodgart's Trs., 8th

Dec. 1893, 21 R. 246.

<sup>4</sup> Bell's Trs. v. Bell, 8th Nov. 1884, 12 R. 85.

<sup>5</sup> See Macfarlane, 13th June 1891, 18 R. 939.

executory estate available for the payment of the deceased's CHAP. VI. debts.<sup>1</sup>

Where the debts due are not expected to be paid in full, they may be valued at the sum which it is estimated will be realised. Stocks or shares held by a deceased which are unsaleable and of no market value, are sometimes given up at a nominal sum for the purpose of obtaining confirmation to them; and claims which may be disputed or otherwise uncertain, may competently be given up in an inventory and confirmed, without having any value attached to them in the meantime, their value, if any, after it has been ascertained, being given up and confirmed before payment is demanded.<sup>2</sup>

In estimating the value of any asset, such as a policy of insurance or bank stock, assigned in security of a debt due by the deceased, either by formal assignation or in such manner that the executor will only be entitled to recover the surplus value after the debt is paid, it has been held competent in practice to include in the inventory and confirm only such surplus value. Where heritage has been conveyed as the primary security, along with a policy of insurance, deduction may be made from the value of the policy only in so far as the value of the heritage may be insufficient to satisfy the debt (Anderson, 28th May 1884). Where the policy is a collateral security, a rateable proportion of the debt may be deducted from it in fixing its value (Thorburn, 20th Nov. 1885). The value also of a deceased person's interest in a succession may be reduced by the deduction of any advances or debts due by him to the same estate (Rose, 12th Dec. 1889). The amount in a bond over property sold by the deceased may be deducted from the price to be recovered by his executors (Thomson, 18th April 1883). The amount of debt for which a ship has been mortgaged may be deducted from

<sup>1</sup> Bain v. Munro, 10th Jan. 1878, 5 R. 416. See Williams on *Executors*, 1521, note.

<sup>2</sup> Williamson v. Fraser, 13th Nov. 1832, 11 S. 7.

CHAP. VI. its value. Such deductions, unlike ordinary debts, affect not only the amount of duty, but also the amount for which caution may have to be found by the executor. Where a debt due to the deceased and a security granted therefor are both given up, the value will be the amount to be recovered.

#### OATH TO INVENTORY.

Who may  
take oaths.

Oaths and affirmations to inventories of personal estate given up to be recorded in any Sheriff Court, and to revenue statements appended thereto, may be taken before the Sheriff or Sheriff-Substitute, or any Commissioner appointed by the Sheriff, or before any Commissary Clerk or his depute, or where the office of Commissary Clerk has been abolished before any Sheriff Clerk or his Depute, or before any Notary Public, Magistrate, or Justice of the Peace in the United Kingdom, and also if taken in England or Ireland before any Commissioner for Oaths appointed by the Courts of these countries, or if taken at any place out of the United Kingdom, before any British Consul, or local Magistrate, or any Notary Public practising in such foreign country, or admitted and practising in Great Britain or Ireland.<sup>1</sup> Solicitors in the Inferior Courts in Scotland, and their partners in business, are disqualified from acting as Justices of the Peace;<sup>2</sup> but the disqualification does not apply where a Magistrate or Dean of Guild in any burgh is acting *ex officio*.<sup>3</sup>

Who may  
depone.

Where an inventory is given up for the purpose of obtaining confirmation, the oath must be taken by some person who is entitled to it either as executor-nominate or executor-dative. But should confirmation not be required, and the inventory be given up merely for the purposes of the Revenue, no formal appointment or decerniture as

<sup>1</sup> 63 and 64 Vict. c. 55, § 8.

*Digest*, 540.

<sup>2</sup> 6 Geo. IV. c. 48, § 27; Barclay's

<sup>3</sup> 19 and 20 Vict. c. 48, § 4.

executor is necessary. Any one who has an interest in the succession as next of kin, legatee, or otherwise, or as representing the beneficiaries in any character, may make oath and pay the duty,—every person who intronits with the estate with or without a title as executor being bound to do so.<sup>1</sup> Whenever the deponent is acting under any appointment, such as a judicial factor not decerned executor, the appointment is exhibited and recorded along with the inventory. If confirmation should be required at any future time, any executor duly appointed may, by special oath, crave confirmation of the inventory already recorded even though not given up by him, without again paying the duty [FORM 70].

Where the executor or beneficiary resides abroad, the oath may be taken by an attorney or mandatory duly appointed. The document containing the appointment must be exhibited and signed as relative to the oath, and (if not already recorded, either in the Books of Council and Session, or in the books of a Sheriff Court) recorded along with the inventory. If the document is in a foreign language, an authenticated translation may be recorded, but the principal must also be exhibited and deponed to. Where the power granted is merely to make oath to the inventory and crave confirmation, the document containing it is held under the Stamp Act of 1891 to be exempt from duty;<sup>2</sup> but if authority is also granted to uplift and discharge, it must be impressed with a stamp of 10s. before it can be recorded [FORMS 63 (e), 73].

By the Oaths Act 1888,<sup>3</sup> every person upon objecting to being sworn, and stating as the ground of such objection either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath, in

CHAP. VI.

Attorneys,  
factors,  
etc.Affirma-  
tions.

<sup>1</sup> Att.-Gen. v. New York Brew-  
eries Coy., 1899, A.C. p. 71.

<sup>2</sup> 54 and 55 Vict. c. 39.

<sup>3</sup> 51 and 52 Vict. c. 46.

**CHAP. VI.** all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath. And it is provided that affirmations in writing shall commence: "I, A. B., do solemnly and sincerely affirm," and the form in lieu of jurat shall be "Affirmed at                      this                      day of

before me." It is also provided that if any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question [FORM 63 (c)].

Contents  
of oath.

The fact of death, and the place and date thereof, must be distinctly set forth. The observations made with regard to the corresponding averments in petitions for the appointment of executors (page 107) apply also to those required in the oath. The domicile now requires to be deponed to in every case as directed on the margin of the form. When the deponent is an executor-dative, he should narrate the decree by which he has been appointed, and where he is an executor-nominate, the deed or deeds (such of them as are holograph being expressly so described) containing his nomination, with the names and designations of the whole executors, if any, nominated along with him, and whose nomination may not have been recalled or superseded by the deceased, specifying also those who may have died, or who may have declined to accept the office, and any other specialty affecting the title to confirmation. Where the executors are assumed trustees the deed of assumption, and if trustees appointed by the Court the decree appointing them, must be narrated and exhibited, and recorded with the inventory [FORM 63 (b)].

Deponent's  
title.

It is required by Statute that the person exhibiting an inventory must also exhibit therewith "any testament or other

writing relating to the disposal of such estate and effects, or any part thereof, which the person or persons exhibiting such inventory shall have in his, her, or their custody or power," and "such testament or other writing (if any such there be) shall be recorded along with the inventory."<sup>1</sup> The production of the testamentary writings left by the deceased, other than those founded on for confirmation, is necessary, not only for the requirements of the revenue, but that it may be ascertained that nothing contained in them affects the appointment of executors. Writings "relating to the disposal of the estate" are not held to include onerous deeds such as antenuptial contracts of marriage unless they contain testamentary provisions. The writings to be exhibited and recorded are—all valid and effectual documents of a testamentary character relating to any portion of the deceased's estate executed by him<sup>2</sup> (Muir, 31st July 1880), or by others under powers conferred by him to alter the destination (Gibb, 23rd Oct. 1866); but not writings which have been revoked or are inoperative. Where a mutual will by two persons had a codicil appended thereto, to take effect only in the event of both parties dying at the same time, and one survived, the codicil was not recorded (Dalzell, 8th Dec. 1886). Where two sisters, by mutual settlement, left their whole estate to the survivor, and by another mutual settlement disposed of the estate after the death of the survivor, who had power to revoke it, the second settlement not being a final and effective writing relating to the disposal of the first deceased's estate, was not recorded with her inventory (Dunlop, 14th March 1887).

Testamentary writings must be exhibited if in the deponent's "custody or power." Writings are held to be in the "power" of the deponent if an extract or official copy can be obtained. Where an unrecorded deed has been lost or

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Writes to be exhibited.

If in deponent's power.

<sup>1</sup> 48 Geo. III. c. 149, § 38, App. III. *Fraser v. Forbes' Trs.*, 3rd Feb.

<sup>2</sup> As to informal writings see 1899, 1 F. 513.

CHAP. VI. mislaid (Craigie, 6th July 1875), or where nothing better can be obtained (Dryburgh, 4th June 1878), a plain copy has been exhibited and recorded. A testamentary writing, which had been reduced in absence in respect of non-production, being referred to in an oath, a copy of the writing and a certified copy of the interlocutor reducing it were exhibited and recorded (Syme, 8th July 1889). In an oath to an inventory given up by a next of kin (no confirmation being required), it was deponed to that a will had been proved in Australia by an executor-nominate, that no copy had been received in this country, but that a copy had been written for and would be exhibited at the Stamp Office when required (Logan, 12th Nov. 1883). An application to omit from the record a portion of a writing exhibited has been refused (Brown, 19th Dec. 1865). Where any additional writings are discovered after the inventory has been given up, but before confirmation is issued, they may be exhibited and recorded with an additional oath (M'Farlane, 27th Dec. 1876); if the confirmation has been issued, and an additional inventory requires to be given up, they are then exhibited and recorded (Seymour, 7th Jan. 1868). A mutual deed, though already recorded with the inventory of the first deceiver, must be again exhibited with the inventory of any other party to it. The deed is not actually rewritten in the record, but a reference to the previous entry is inserted, and the deed docqueted as having been again recorded.

Revenue  
requirements in  
oath.

In all cases the inventory must be deponed to as a full and complete inventory of the personal estate, situated not only in Scotland, or in the United Kingdom, but wheresoever situated and whether subject to duty or not, and reference is made to the revenue statement annexed, the amount of estate duty and the receipt therefor.

At the end of the oath the deponent must state whether confirmation is or is not required. This requirement was

introduced under Instructions from the Commissaries of Edinburgh to their clerks in 1823, following upon the Statute of that year which abolished partial confirmations, and made it necessary that any person requiring confirmation should confirm the whole moveable estate known at the time to which he should make oath. The Statute was read by the Commissaries as requiring the executor to make oath that the estate to which he required confirmation was the whole moveable estate known at the time confirmation was applied for, and therefore that if no confirmation was required when the inventory was given up, but should be applied for subsequently, a special oath was necessary to the effect that no additional estate had been discovered. If any new estate should be discovered, it must of course be given up in an additional inventory, and included in the confirmation. These instructions have always been observed and are still in force.<sup>1</sup> Where confirmation is craved but not expedite within six months from the date of recording the inventory, the craving is held to be abandoned, and if confirmation is still wanted a special oath may be required [FORM 70].

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Craving for  
confirmation.

Where any essential averment has been omitted in the principal oath, such as that relating to domicile (Cook, 3rd April 1888), or where any change of circumstance has occurred after the oath has been taken, and before the inventory has been recorded or confirmation granted, such as the death of an executor (Ramsay, 19th Sept. 1882), or the discovery of a testamentary writing (Collins, 28th Oct. 1882), a short additional oath may be given up either by the same or by any other executor of the deceased [FORM 63 (d)].

Additional  
oath.

Where the deponent is unable to sign, a statement to that effect, and of the cause of the inability, is added to the deposition, and the person before whom the deposition is taken signs alone.

Deponent  
unable to  
sign.

<sup>1</sup> Appendix vi.

REVENUE STATEMENT.<sup>1</sup>

CHAP. VI. The contents of the Revenue Statement now annexed to the  
 Contents. inventory consist of Schedules of debts and Accounts of personal property other than executry estate, passing or deemed to pass on the death of the deceased, and liable in estate duty, and of real or heritable property also now subject to the same duty.

Schedule of Debts. By the Customs and Inland Revenue Act 1881, it was enacted that on and after 1st June 1881, in the case of a person dying domiciled in any part of the United Kingdom, it should be lawful for the person exhibiting an inventory in Scotland to state in his affidavit the fact of such domicile, and to deliver therewith or annex thereto a schedule of the debts due from the deceased to persons resident in the United Kingdom and the funeral expenses, and in that case, for the purpose of the charge of duty on the inventory, the aggregate amount of the debts and funeral expenses appearing in the schedule should be deducted from the value of the estate and effects whereof the inventory should be exhibited. Debts to be deducted under the power thereby given must be debts due and owing from the deceased, and payable by law out of any part of the estate and effects comprised in the inventory, and are not to include voluntary debts expressed to be payable on the death of the deceased, or payable under any instrument which shall not have been *bond fide* delivered to the donee thereof three months before the death of the deceased, or debts in respect whereof any real estate may be primarily liable, or a reimbursement may be capable of being claimed from any real estate of the deceased, or from any other estate or person.

Under the Finance Act 1894, the schedule of debts and funeral expenses formerly appended to the inventory has

<sup>1</sup> The sections and sub-sections "Accounts" referred to are those hereinafter referred to in this Chapter appended to the REVENUE FORM are those of the Finance Act 1894, A—1\*. where not otherwise specified, and the

been transferred to the Statement, and some important changes have been made in regard to its contents. Debts may now be deducted wherever the deceased may have been domiciled, and wherever the persons to whom they are due may reside. If due to persons resident abroad, however, debts cannot, unless charged on property within the United Kingdom, or contracted to be paid there, be deducted beyond the value of any assets abroad on which duty falls to be paid. Where the foreign debts exceed the foreign assets, any excess of duty paid on the inventory on account of foreign debts not having been deducted will be returned by the Commissioners on their being satisfied that the foreign estate was insufficient to meet them (§ 7 (2)).

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Foreign debts.

The most important change on the Schedule of debts, however, is that the debts must have been incurred by the deceased not only without available right of reimbursement, but also for full consideration in money or money's worth, for his own use and benefit, and take effect out of his interest (§ 7 (1) (a)). These stipulations are held to exclude all voluntary obligations incurred by the deceased for the benefit of others, and especially all obligations under marriage settlements, which, so far as payable out of the executry estate, were formerly allowed as debts in fixing the sum on which duty was paid. And it has been decided that the estate duty on marriage contract funds payable out of executry estate is a burden not on the funds but on the residuary estate.<sup>1</sup>

Marriage contract debts.

In other respects the debts allowed to be deducted under both Statutes are the same. The debts must have been incurred by the deceased. All expenses incurred by the executors in the realisation or management of the estate and all charges accruing against the estate after the death such as interest on the debts, are inadmissible. But house rents, taxes, servants' wages, and other payments for terms current

Debts deductible.

Gray v. Gray, 12 Mar. 1896, 1 Ch. 620; *Scots Law Times*, 3, 280.

CHAP. VI. at the death, for which the deceased was liable, are debts due by him and may be deducted in so far as no arrangement has been made by which the estate will be relieved or reimbursed. Feu-duties and interest on heritable bonds down to the date of death corresponding to the proportion of rents which falls to be given up in the inventory are personal debts due by the deceased. A claim for the future aliment of an illegitimate child has also been admitted (H., 6th July 1889).<sup>1</sup> Where a husband had invested considerable sums in his wife's name by way of donation to her, and after her death gave up an inventory of the funds so invested for confirmation and deducted as a debt their total value on the ground that he had revoked the donation after his wife's death, the deduction was disallowed as not being a debt due by her at her death, and confirmation was refused until the deduction was withdrawn and the duty paid.<sup>2</sup>

Funds  
vested in  
deceased  
for others.

Where a trustee or executor has invested the trust or executry estate absolutely in his own name, or has intermixed it with his own so that it cannot be identified, and it is included in his inventory, the amount for which he is liable to the beneficiaries is a debt. Where a husband has left his whole estate to his wife in liferent and his children in fee, and she has intermixed the estate with her own funds, at her death the capital of the estate, so far as not already advanced to the children or expended for their behoof, is a debt due by her; and where the husband had authorised his wife to apply the whole of his estate for her own use during her life, and directed that whatever might remain at her death should go to certain persons named by him, and at the wife's death the estate had increased in value, the capital of the husband's estate was deducted as a debt, and duty paid only on the difference

<sup>1</sup> *Downs v. Wilson's Trustee*, 7th July 1886, 13 R. 1101.

dine, *Aberdeen Journal*, 29th May 1884.

<sup>2</sup> In the Sheriff Court of Kincar-

(Stephen, 11th March 1887). Where property belonging to a wife, exclusive of her husband's *jus mariti*, had been intermixed with his own funds its value was deducted as a debt (White, 7th June 1889). CHAP. VI.

Where a deceased had paid off a heritable bond but had taken an assignation to the bond instead of a discharge, the bond was included in the inventory and confirmation in order to make up a title and clear the record of the apparent burden, but the debt was held to be extinguished by confusion and no duty paid (Fisher, 20th Nov. 1890).<sup>1</sup> In other similar cases where the value of the bond is included in the inventory it falls to be also included in the schedule of debts.

Debts whereof a reimbursement may be claimed from any other estate or person cannot be deducted. This excludes sums due under cash credit bonds where the deceased is not the principal debtor, and other cautionary obligations except where the deceased has become the sole obligant. Bills drawn and discounted by a deceased are debts due by him to the bank with recourse against the acceptors and cannot, therefore, be deducted unless irrecoverable from them (Finlay, 11th Oct. 1886). Where the discounted bills appear in the inventory as debts due to the deceased by the acceptor they may also be included in the Schedule as debts due to the bank (Bone, 25th March, 1889). Reim-  
bursement  
claimable.

No allowance is made more than once for the same debt charged upon different portions of the estate, and any debt or incumbrance for which an allowance is made is deducted from the value of the property liable therefor. But where the heritable property is insufficient to meet the burdens imposed on it the balance will be chargeable against the moveable estate and *vice versa*. Assets  
liable for  
debts.

The funeral expenses allowed are in the Act of 1881 described as "reasonable funeral expenses according to law" and

<sup>1</sup> See Lord Advocate v. Mar- 1872, 11 M. 6; M'Ewan v. Murray,  
chioness of Lansdowne, 15th Oct. 18th Dec. 1890, 28 S.L.R. 223.

CHAP. VI. in the Act of 1894 simply as "reasonable funeral expenses."

Funeral  
expenses.

There seems to be no practical difference. Reasonable funeral expenses would appear to mean all expenses connected with the interment required by decency and custom as necessary and proper according to the rank and circumstances of the deceased. They will include at least all expenses which an executor would be held entitled by law to pay in a question with the beneficiaries—the expense of the widow's mournings, and also moderate and suitable mournings for the family. Whether and to what extent servants' mournings are allowable will depend upon what is usual and becoming in the circumstances of each case.<sup>1</sup> The erection of a tombstone, however, is not held to be a funeral expense. The widow's right to mournings is not barred by her having accepted provisions bearing to be in full of all claims against her husband's estate.<sup>2</sup> The doctor's bill is frequently included in the schedule under this head, but it is more properly a death-bed than a funeral charge and should be deducted under the head of debts.

There is a separate Schedule (No. 2) for debts due to persons resident out of the United Kingdom and chargeable in the first instance against property abroad (§ 7 (2)). In this schedule may be included any foreign duty paid or expenses incurred so far as these have been ascertained (§ 7 (3), (4)).

Power of  
disposal  
unexercised.

After the Schedules of debts the Revenue Statement contains a form of ACCOUNT (No. 3) of moveable property which the deceased at the time of his death was competent to dispose of, but which he did not dispose of. Such property is now liable in estate duty whether the power has been exercised or not (§ 2 (1) (a)). Where the power has been exercised, the property, if personal, must as formerly be

<sup>1</sup> Fraser on *Husband and Wife*, 990; Bell, *Prin.*, 1403; Stair, *More's Notes*, 362; Erskine, 3. 9. 42, 43.

<sup>2</sup> Buchanan, 14th Feb. 1822, 1 S. 323; M'Intyre, 9th July 1865, 3 M. 1074.

included in the inventory like other executry estate, and confirmed therewith (p. 146). Where the power has not been exercised, the personal property subject to it is not executry estate, and falls to be given up not in the inventory, but in the Statement. Money which a person has a general power to charge on property is deemed to be property of which he has power to dispose (§ 22 (2) (c)) and falls to be given up in this Account.

The personal property other than executry estate which requires to be accounted for in ACCOUNT No. 4 of the State-  
PERSON-  
ALTY  
OTHER  
THAN EXE-  
CUTRY.  
 ment includes all property formerly liable to account duty under the Customs and Inland Revenue Acts 1881,<sup>1</sup> and 1889<sup>2</sup> (§ 2 (1) (c)), and generally all settled personal property chargeable with estate duty. The property liable in account duty consisted of—

- (1) Donations *inter vivos* made within twelve months of the death of the donor (which include gifts for public or charitable purposes made within that period), or whenever made, if the donee had not received immediate, continuous, and complete possession; and all donations *mortis causa*.
- (2) Property which a deceased person has gratuitously invested in his own name, and that of some other person, so that it passes to that other person on his death.
- (3) Property which a person has conveyed by gratuitous settlement other than a will under reservation of his life, or of power to revoke the destination and restore the property to himself.
- (4) Policies of insurance effected by any person dying on or after 1st June 1889 on his life where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of

<sup>1</sup> 44 Vict. c. 12, § 38, App. xvii.

<sup>2</sup> 52 Vict. c. 7, § 11, App. xviii.

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such money in proportion to the premiums paid by him where the policy is partially kept up by him for such benefit. In a case where a person who had for many years paid the premiums on an insurance policy on his own life for his own behoof, assigned it to his daughter who thereafter paid the premiums, it was held that the section did not apply, and no estate duty was payable on the policy at the father's death.<sup>1</sup>

Marriage  
contract  
funds.

Funds settled by antenuptial contract of marriage were formerly exempt from account duty on the ground that the disposition of them was not voluntary and gratuitous, but was granted for onerous consideration. The change in the terminology of the Account Duty Acts effected by the Finance Act (§ 2 (1) (c)) is held to have abolished the exemption in favour of marriage contract funds, so that all such funds invested in the names of trustees or otherwise, whether contributed by the intended spouses or by their parents or others for their behoof, are now included in the property subject to estate duty.<sup>2</sup> Where personal property settled by marriage contract has reverted to the settler by the failure of issue it is executry estate, and falls to be given up in the inventory of the deceased settler and confirmed (p. 145). Where such property is subject to the life-rent of a surviving spouse its value as executry estate will be diminished by the value of the life-rent. The whole property, however, being subject to estate duty, requires to be set forth also in the statement, but its value as executry will be excepted from aggregation and payment of duty as settled property (§ 7 (10)).

Annuities,  
etc., accru-  
ing to sur-  
vivors.

To the personal property, other than executry, liable in estate duty fall to be added annuities,—other than a single

<sup>1</sup> Lord Advocate v. Robertson, 20th March 1895, 22 R. 568, C.S.; 18th Feb. 1897, 24 R. 42 H.L. <sup>2</sup> Gray v. Gray, 12th March 1896, 1 Ch. 620; *Scots Law Times*, 3, 280.

annuity not exceeding £25 (§ 15 (1)),—or other interests CHAP. VI.  
 purchased or provided for by the deceased to the extent of  
 the beneficial interest accruing or arising to a survivor on  
 the death of a deceased (§ 2 (1) (d)). This provision is  
 held to include all annuities and allowances payable to the  
 widow or children of a deceased out of the funds of any  
 corporation or society of which he was a member, such as  
 the Edinburgh Merchant Company or Society of Writers to  
 the Signet. [ACCOUNT No. 9.] But pensions by the Govern-  
 ment of India to the widows and children of a deceased  
 officer are exempt (§ 15 (3)).

By the Finance Act 1900, § 11, where the deceased or Release of  
Life Inter-  
est.  
 any other person had an interest in property determinable on  
 the deceased's death, and that interest was disposed, whether  
 for value or not, to or for the benefit of any person entitled  
 to the fee or reversion of such property, then the property  
 is nevertheless to be deemed to pass on the deceased's death  
 unless the disposal was *bond fide* made twelve months before  
 the deceased's death and *bond fide* possession and enjoyment  
 was immediately assumed and thenceforward retained to the  
 entire exclusion of the person who had the determinable  
 interest and of any benefit to him by contract or otherwise;  
 and it is provided that this section shall apply to the case  
 of every person dying after 31st March 1900.

The heritable property liable in estate duty, and which HERIT-  
ABLE PRO-  
PERTY.  
 the executor is required to specify in the Statement, em-  
 braces all real estate in the United Kingdom passing on the  
 deceased's death, under the same circumstances, and on the  
 same conditions, as if it had been moveable estate (§§ 1, 2,  
 3). Heritable estate abroad, not being subject to legacy or  
 succession duty, is exempt from estate duty (§ 2 (2)).  
 Not only heritage of which the deceased was the absolute  
 proprietor at his death, but also heritage which he may have  
 settled in his lifetime, and heritage of which he may never

CHAP. VI. have been proprietor but in which he was interested only as a liferenter or heir of entail, and on which the estate duty has not yet been paid, must be set forth in the Statement in ACCOUNTS Nos. 5, 6, and 7.

Valuation  
of heritage.

The value of heritable, like that of moveable, property upon which the duty is payable is the price which it would fetch in the open market at the time of the deceased's death (§ 7 (5)); and allowance is to be made for all debts and encumbrances affecting the property, subject to the same conditions as are applicable to debts against personalty (§ 7 (1)). An appraisalment of the heritage may be obtained from a qualified valuator (§ 10 (6)), or the executor may make up his own estimate of the value, giving details as to how it has been arrived at. Where the property has been recently purchased, or where it has been sold since the death, the actual price may generally be taken as the value. A special rule is provided for the appraisalment of agricultural property (§ 7 (5)). In all cases the valuation will be open to adjustment on the account being afterwards examined at the Stamp Office (§§ 7 (8) (9), 8 (7) (12)).

Leasehold  
property.

It may be noted that in England and Ireland leasehold property is not heritage but personalty, and falls to be included in the inventory of personal estate where the duty on it is paid in Scotland (FORM 64).

Heritable  
securities.

Heritable securities excluding executors, and securities by conveyance *ex facie* absolute though heritable *quoad* succession, were formerly subject to inventory duty, which might be paid either by adding them to the personal estate in the inventory, or by giving up a separate inventory direct to the Stamp Office (pp. 130, 133). But as all heritage of whatever kind is now subject to the new duty, it would appear that such money will fall to be given up in the statement along with the other heritable property.

Settled property is defined as meaning any property or

any estate or interest in property which stands for the time being limited to or in trust for any persons by way of succession in whatever manner the settlement may have been effected (§ 22 (1) (h) (i)). Settled property may be either moveable or heritable estate. If moveable, it will be set forth in ACCOUNTS Nos. 4 or 8 ; if heritable in ACCOUNTS Nos. 5, 6, or 7.

CHAP. VI.  
SETTLED  
PROPERTY.

It is important to observe that settled personal property which has already paid either inventory duty or account stamp duty under previous Acts is not liable, and all settled property, whether real or personal, which has paid estate duty under the Finance Acts, does not again become liable to estate duty, until it has passed into the possession of a person competent to dispose of it (§§ 21 (1), 5 (2)). Such property is not therefore liable to duty on the death of a mere liferenter, if one or other of these duties has been paid since the date of the settlement. Where the settler died previous to 2nd August 1894, leaving estate consisting wholly of personalty on which inventory or account duty has been paid or is payable, no estate duty will be exigible on the death of any number of successive liferenters. But where the settled property consisted of real estate, or of personal estate abroad upon which inventory duty was not exigible, then on the death of the first liferenter after 2nd August 1894 the Act requires that such property shall be accounted for and estate duty paid thereon. Where the succession which passes on such liferenter's death was partly real and partly personal at the settler's death, estate duty will be payable upon the proportion which represents the real estate and any personal estate upon which inventory duty has not been paid. In the case of property settled by persons dying after 1st August 1894, the whole estate duty will be paid at once, and not again so long as the property remains in settlement, or until the death of a person competent to dispose of it.

When  
estate duty  
payable  
thereon.

Estate duty is not payable on settled property on the

**CHAP. VI.** death of any person dying before his interest under the settlement has become an interest in possession where subsequent limitations (liferents) continue to subsist (§ 5 (3)); nor on property settled by one spouse on the other under a disposition which has taken effect before 2nd August 1894, on the reversion of the whole or part of the income thereof to the settler by that other's predecease (§ 21 (5)). With the exception just referred to, settled property, under the Act of 1894, the absolute possession or power of disposal of which reverted to the settler in his lifetime, was held to be on such reversion subject to estate duty.

**Under Act of 1896.** And by the Act of 1896 estate duty in the case of persons dying on or after 1st July 1896 is not to be levied—

(1) Where a settler, who is also liferenter, acquires, by the death in his own lifetime of a person who has right to a subsequent life-rent or limited interest under the settlement, an absolute reversion or power to dispose of the whole property (§ 14); (2) where under a disposition the property disposed reverts to the disponent in his lifetime on the death of a person having only a liferent or limited interest under the disposition, unless such person "had at any time prior to the disposition" been competent to dispose of such property (§ 15 (1) (2) (3)); (3) where a husband is entitled in right of his wife to the rents of her heritable estate, and he dies in her lifetime, so that she becomes entitled to the property in virtue of her former interest (§ 15 (4)).

**Terce and  
courtesy.**

The liferent interests of terce and courtesy conferred by law on a surviving wife or husband are to be regarded as if they had been conferred by the will of the predeceasing spouse. On the death of the survivor, should the property out of which the liferent interest is payable not have already paid estate duty, that duty will become payable to the extent of one-third in the case of terce, and the whole value in the case of courtesy (§§ 23 (19), 2 (1) (b), 7 (7)).

By the Act of 1896 (§ 21), where on the death of any

person dying on or after 1st July 1896 estate duty becomes CHAP. VI.  
 payable in respect of any property passing under a settle- Duties which may be deducted.  
 ment which took effect before 2nd August 1894, and  
 previous to that date, any of the following duties have been  
 paid or are payable—viz., the additional succession duties  
 imposed by 51 and 52 Vict. c. 8, § 21; the temporary estate  
 duties imposed by 52 and 53 Vict. c. 7, §§ 5 and 6; and the  
 1 per cent. legacy and succession duties; such duties are  
 allowed as a deduction from the estate duty.

In the application of the Acts to Scotland the expression ENTAILED PROPERTY.  
 “settled property” does not include property in that country  
 held under entail (§ 23 (14)). An institute or heir of entail  
 in possession of an entailed estate is deemed to be a person  
 competent to dispose of the estate (§ 23 (15)).

Where an entailed estate passes on the death of the  
 deceased to an institute or heir of entail who is not entitled  
 to disentail such estate without the consent of subsequent  
 heirs, or having such consent valued and dispensed with,  
 settlement estate duty as well as estate duty shall be paid  
 in respect of such estate, but neither estate duty nor settle-  
 ment estate duty shall be again payable in respect of such  
 estate until such estate is disentailed, or until the death of  
 an heir to whom it has passed on or subsequent to the death  
 of the institute or heir first mentioned, who is entitled to  
 disentail it without consent or having consents valued and  
 dispensed with (§ 23 (16)).

By the Act of 1896, § 23, it is provided that for  
 purposes of § 18 of the Act of 1894, relating to succes-  
 sion duty, an institute or heir of entail shall not be deemed  
 competent to dispose of the estate unless he is entitled to  
 disentail without consent or having consents valued and  
 dispensed with.

Settlement estate duty is a duty at the rate of 1 per

**CHAP. VI.** cent. in addition to the estate duty leviable on all property which is settled by the will of the deceased, or having been otherwise settled passes on deceased's death to some person not competent to dispose of it, except where the only life interest in the property after the death of the deceased is that of the deceased's spouse (§§ 5 (1) (a), 17). But this duty is payable only once during the continuance of the settlement (§ 5 (1) (b)); and not at all where the settlement took effect before 2nd August 1894 (§ 21 (4)).

**SETTLEMENT ESTATE DUTY.**  
  
**When executor liable.**

By the Act of 1894, the executor was not required on giving up his inventory to account for any property liable in settlement estate duty. But by the Act of 1896 (§ 19), where this duty is leviable in respect of a legacy or other personal property settled by the will of the deceased, an account thereof must be delivered by the executor within six months of the death, or within such further time as the Commissioners may allow, and duty paid thereon,—the duty being payable out of said legacy or property, unless the will contains an express provision to the contrary. And this rule is held by the Inland Revenue applicable to the estates of all persons dying after 1st August 1894. It has been decided that property settled upon a contingency which might never occur was subject to settlement estate duty.<sup>1</sup> But by the Finance Act 1898, § 14, it was provided that where in the case of a death occurring after the commencement of the Act, 1st July 1898, settlement estate duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has not arisen and cannot arise, the duty shall be repaid.

**AGGREGATION.**

The rate of estate duty is graduated from 1 to 8 per cent. (§ 17), and is determined by the aggregate value of the various kinds of property upon which it is exigible (§ 4). In making this aggregation two kinds of property were

<sup>1</sup> *Inland Revenue v. Stewart's Trustees*, 20th Jan. 1899, 1 F. 416.

excepted by the Act of 1894—(1) Property in which the deceased never had an interest, but which passes or is deemed to pass on his death. This exception is applicable, *inter alia*, to insurance policies kept up for a donee and to annuities and other interests emerging on the death of a member of a society or company having a widows' or orphans' fund to which its members are bound to contribute, but from which they can derive no personal benefit (p. 149). [ACCOUNT No. 9.] (2) Property which passes immediately on the death of the deceased to some person other than the spouse, descendants or ascendants of the deceased, under a settlement not made by such deceased. This exception is applicable to property in which a deceased had a life interest under a disposition not made by himself, but no power of disposal, and which passed at his death away from his own family. Where any benefit arose to the surviving spouse or to any descendant or ascendant of the deceased, such benefit falls to be aggregated with the deceased's own estate. Any property not aggregateable is dealt with as an estate by itself, and the duty thereon, at the rate determined by its separate value, paid on a special form provided by the Stamp Office.

CHAP. VI.  
Property  
excluded.

An Estate  
by itself.

But by the Finance Act 1900, § 12 (1), in the case of persons dying on or after 9th April 1900, the exclusion from aggregation remains operative only as regards property in which the deceased never had an interest, but under reservation of any rights in an interest in expectancy acquired by purchase or mortgage before the passing of the Act. The only property excepted from aggregation when the death occurs after 9th April 1900, therefore, is property in which the deceased never had an interest. Such property may be either personal or heritable, and though the duty is payable separately, the executor is required to disclose it (if any). [ACCOUNTS Nos. 7 and 9.]

Exclusion  
restricted.

A special exception to aggregation is made in another form where the net value of the property, real and personal,

CHAP. VI. in respect of which estate duty is payable—exclusive of property settled otherwise than by the will of the deceased—does not exceed £1000 (§ 16 (3)). In this case settled property is excluded from aggregation whether the settlement was made by the deceased himself *inter vivos*, or by some other person, and irrespective of the destination of the property. The remaining estate is to be dealt with as an estate by itself, and its net value alone to be taken into account in fixing the rate and amount of estate duty to be paid thereon. And it is also provided that it shall be exempted from the payment of settlement estate, legacy, and succession duties. If the gross value does not exceed £500, it may be dealt with both as regards duty and title under the Small Estates Acts. Under this provision it is not the excluded property that forms the estate by itself but the property left after the exclusion. The excluded property though it may consist of more than one item, does not appear to be subject to aggregation.

Estates not exceeding £1000 net value.

Exempt from other death duties.

By § 12 (2) of the Act of 1900, property “settled” by a person who died on or before 1st August 1894, and which would, if the settler had died after that date, have been chargeable with estate duty on his death, is only to be charged on aggregation by not more than one-half per cent. additional duty than it would have paid if treated as an “estate by itself,” and the rate of duty upon any other property aggregated with such “settled” property, by force of § 4 of the Finance Act 1894 as amended, is not to be enhanced by reason of such aggregation more than one-half per cent. Such settled property is required to be set forth in ACCOUNT No. 6.

BY WHOM  
ESTATE  
DUTY  
PAYABLE.

While the executor is bound to disclose and value the whole property liable in duty on the death of the deceased, in order to fix the rate at which the duty shall be assessed, he is not bound to pay any duty except that exigible on the executry estate contained in his

inventory after deducting debts, and on any other personal estate of which the deceased was competent to dispose at his death. But he may also at the same time pay the duty on any other property included in his statement which may be under his control, and even on property not under his control if requested to do so by the persons accountable for the duty (§ 6 (2)).

The accountability for all duty which the executor is not bound to pay rests on the persons to whom the property passes either beneficially or in trust, and such duty forms a first charge on such property (§ 9 (1)). If not paid by the executor on giving up the inventory, duty must be paid by the persons accountable therefor on a separate account delivered direct to the Inland Revenue Office (§§ 8 (4) (5), 6 (4)). Where the executor has paid duty for which the executry estate is not liable, he is entitled to be repaid by the trustees or owners of the property accountable for such duty (§ 9 (4)).

The value of all property upon which estate duty is payable is to be taken as at the date of the deceased's death, and includes interest and proceeds accrued thereon down to that date. By the Act of 1894 the duty was charged on even sums of £10, any fraction thereof being reckoned also as £10 (§ 17). Interest on the duty on the personal estate began to run from the date of death at the rate of 3 per cent. If the inventory was not given up within six months, the interest for that period was added to the duty, and the whole became a debt to the Government bearing interest at the rate of 4 per cent. until paid (§§ 6 (6) (7), 8 (10)). Interest on the duty on real estate did not begin to run until twelve months after the death, and the duty was payable in eight yearly or sixteen half-yearly instalments (§ 6 (8)).

By the Act of 1896 (§ 17), it was provided in the case of all persons dying on or after 1st July 1896 that the principal value of an estate shall be reckoned only in complete

CHAP. VI.

Beneficiaries accountable.

Amount of duty and interest.

Under Act of 1894.

Under Act of 1896.

**CHAP. VI.** hundreds, and that any fraction of a hundred shall be excluded from the value for the purpose of determining both the rate and the amount of duty, except that where the principal value exceeds £100 and does not exceed £200, the duty shall be one pound. The rule here laid down is held applicable to an estate by itself as well as to an aggregated estate and also to an estate liable in settlement estate duty.

**Duty and Interest under Act of 1896.** But by the Finance Act 1900, in the case of all persons dying on or after 9th April 1900, this rule was abrogated and the duty became payable both as regards rate and amount on the net value of the estate.

**Under Act of 1900.** By § 16 of the Act of 1896 the duty in respect of any annuity or other definite annual sum referred to in § 2 (1) (d) of the Act of 1894, may be paid by four yearly instalments, the first to be due twelve months after the death.

**Duty on annuities.** By § 18 (1) of the Act of 1896, simple interest at the rate of 3 per cent. per annum, without deduction for income-tax, is made payable upon all estate duty from the date of the death of the deceased, except that where the duty is payable by instalments, or becomes due at any date later than six months after the death, interest shall run only from the date of the first instalment or of the whole duty becoming due. Where, therefore, the duty upon real estate or upon any annuity purchased or provided by the deceased and arising at his death, is paid by the executor, on giving up his inventory of the personal estate, within twelve months of the death, no interest is due thereon. These provisions of the Act of 1896 as to payment of interest are held by the Inland Revenue to apply whether the death was before, on, or after its date.

**Rule as to interest.** In addition to the special provisions for deferring payment of duty already referred to (pp.126–27), power is given to the Commissioners of Inland Revenue, when they are satisfied that the estate duty could not be raised without excessive sacrifice, to allow payment thereof to be postponed for

such period and on such terms as they may think fit CHAP. VI.  
 (§ 8 (9)).

Estate duty is expressly declared to be a stamp duty Receipt equal to stamp.  
 (§ 6 (1)), but the only stamp impressed on the inventory is one denoting the rate. The amount of the duty is paid to the officers of Inland Revenue, and a receipt for the amount is written on the inventory. This receipt is granted in name of the Commissioners, and is held equivalent to a stamp of the value of the sum received.<sup>1</sup> The duty is accepted subject to any rectification that may be found necessary on examination of the accounts (§ 8 (7) (12)). Rectification is made generally by the giving up of a Corrective inventory. corrective inventory. Where such an inventory does not contain any additional executry estate of which confirmation is or may be required, it need not be recorded but may be sent direct to the Inland Revenue Office. By the Finance Act 1900 (§ 13 (2)), the Commissioners of Inland Revenue may if they think fit accept a statement by or on Statement may be accepted instead of oath. behalf of any accountable person as a correction of any Inland Revenue affidavit or account within the meaning of Part I. of the Finance Act 1894 for the purpose of that Act and the Acts amending that Act, without requiring that statement to be verified on oath.

And by the same Act, § 14, it is provided that where Duty may be partly remitted. the deceased died from wounds inflicted, accident occurring, or disease contracted, within twelve months before death, while on active service against an enemy, whether on sea or land, and was, when the wounds were inflicted, the accident occurred, or the disease was contracted, either subject to the Naval Discipline Act or subject to Military law, whether as an Officer, Non-commissioned Officer, or Soldier, under Part V. of the Army Act, the Treasury may, if they think fit, on the recommendation of the Secretary for War or of the Admiralty, as the case requires, remit, or, in the case of duty

<sup>1</sup> Appendix xxvi.

**CHAP. VI.** paid, repay up to an amount not exceeding £150 in any one case, the whole or any part of the estate or other death duties leviable in respect of property passing on the death of the deceased to his widow or lineal descendants, if the total value for the purpose of estate duty of the property so passing does not exceed £5000, and it is provided that this section of the Act shall take effect in the case of any person dying since 11th October 1899. Application must be made to the Treasury before any relief can be granted under this provision by the Commissioners of Inland Revenue.

## CHAPTER VII.

### APPLICATIONS FOR CONFIRMATION IN SMALL ESTATES.

THE Intestates' Widows and Children (Scotland) Act 1875,<sup>1</sup> CHAP. VII. and the Small Testate Estates (Scotland) Act 1876,<sup>2</sup> were Small Estates Acts. passed, as appears from the preambles of both Statutes, to increase the facilities for expediting confirmation, and to reduce the expense attending the same in cases where the estate is of small amount. Before the passing of these Acts the forms of procedure were such that in all cases, however small the estate, it was necessary to employ an agent to prepare the papers and conduct the proceedings, and the fees of Court were proportionately much heavier than in large estates. In the cases to which these Acts apply the forms are simplified, and the Clerk of Court is bound, on the application of the parties, himself to prepare the necessary inventory and oath, to take the oath of the applicant thereto, or have it taken before a Magistrate or Justice of the Peace,<sup>3</sup> and do all that is necessary in order that confirmation may be delivered to the applicant without the payment of any fee save as is provided for in the schedules annexed to the Acts.<sup>4</sup>

The Act of 1875 applied only to the widows and children Before Finance Act. of intestates and to the children of intestate widows where the whole personal estate left by the deceased did not exceed £150; and the Act of 1876 applied only to executors-nominate where the whole real and personal estate did not

<sup>1</sup> 38 and 39 Vict. c. 41, App. XII.

<sup>2</sup> 39 and 40 Vict. c. 24, App. XIII.

<sup>3</sup> Act of 1876, § 6.

<sup>4</sup> Act of 1875, § 3; Act of 1876,

§ 3.

CHAP. VII. exceed that sum ; and both Acts were limited to the estates of persons dying domiciled in Scotland.<sup>1</sup> By the Customs and Inland Revenue Act 1881,<sup>2</sup> the operation of these Acts was extended in the case of persons dying on or after 1st June 1881 to all applicants for confirmation wherever the deceased may have died domiciled, if the whole personal estate and effects, without deduction of debts or funeral expenses, did not exceed the value of £300. Under the two earlier Acts the inventory was required to be stamped at the ordinary rate before being recorded, and under the Act of 1881, where the whole personal estate exceeded £100 but did not exceed £300 the fixed duty was thirty shillings. In all cases where the deceased has died before 2nd August 1894 these Acts are still in force.

Under  
Finance  
Act 1894.

By the Finance Act of 1894,<sup>3</sup> in all cases where the deceased has died after 1st August of that year the limit of value has been raised to £500, and the estate to be taken into account is the whole real and personal estate subject to estate duty, exclusive only of property settled otherwise than by the will of the deceased, whether settled by the deceased himself or by some other person, and whoever the beneficiaries may be. To the estate so defined all the privileges and restrictions of the Small Estates Acts, both as regards duty and confirmation, have been transferred. The former fixed duty of thirty shillings is continued where the gross value is over £100 and does not exceed £300 and a new fixed duty of fifty shillings is imposed where the gross value is over £300 and does not exceed £500 (§§ 16 (1), 23 (7)). Any property on which the fixed duty has been paid is (as under the Act 1881) exempt from legacy and succession duty and also from the new settlement estate duty (§ 16 (3)). Where it is afterwards discovered that the gross value exceeded £500, duty becomes payable on its net value at the rate per cent. for which it is

<sup>1</sup> Act of 1875, § 3 ; Act of 1876, § 3 ; and Schedules A and B.

<sup>2</sup> 44 Vict. c. 12, § 34, App. xvii.

<sup>3</sup> 57 and 58 Vict. c. 30.

liable without credit being given for the fixed duty already paid (Act of 1881, § 35) and the exemption from legacy and succession duty will not apply unless the net value still does not exceed £1000. But where the thirty shillings duty has been paid and it is afterwards discovered that the gross estate exceeds £300 but still does not exceed £500 an additional stamp of £1 may be impressed upon a corrective inventory.

The provision of the Finance Act of 1896 (§ 17), "that where the principal value of the estate exceeds £100 and does not exceed £200, the duty shall be £1" was held not to be applicable in cases where the procedure was under the Small Estates Acts, and the provision is now superseded (page 186). By the Act of 1894 (§ 16 (5)) no interest is chargeable on the thirty shillings or fifty shillings duty if paid within twelve months. This exemption is held not to be affected by § 18 (1) of the Act of 1896 (page 186), but if the duty is not paid within the twelve months simple interest at 3 per cent. per annum will become payable from the date of death to date of payment. The thirty and fifty shillings duties are paid by impressed stamps and where interest is payable united revenue and postage stamps of the value required are affixed.

The forms of Inventory and Oath prescribed by the Acts of 1875 and 1876, modified in accordance with the provisions of the Act of 1881 and applicable where the death occurred before 2nd August 1894, are given in the Appendix [FORM 72]. The printed form B, issued by the Stamp Office under the Finance Act is now available for all cases where the gross estate is not over £500 in whatever form confirmation may be applied for [FORMS 63].

In filling up this form the whole estate, real and personal, liable in duty, with the exception of property settled otherwise than by the will of the deceased, must be aggregated for the purpose of ascertaining the gross amount of the estate.

CHAP. VII.

Duty and Interest.

Forms of inventory and oath.

Property aggregated.

**CHAP. VII.** Where the aggregated amount exceeds £100 the executor is required to pay the whole duty, thirty shillings or fifty shillings as the case may be. Although there is no express provision on the point, it would appear that in equity the amount paid will fall to be apportioned rateably among the different kinds of property,—executory estate, heritable estate, and personal estate not executory,—and that the executor will be entitled to recover from the respective beneficiaries the proportion due in respect of property not under his control, and for the duty on which he is not accountable (§§ 8 (4), 9 (4)). Although property settled otherwise than by the will of the deceased is not included in the aggregation, it also must be specified so far as the executor is able to do so, in order that application may be made for the duty to the parties responsible therefor. Where the title to heritable property has been taken to the deceased in liferent, and to another or others in fee, it is excluded from aggregation, but not if the deceased had also a power of disposal.

To whom  
application  
made.

The application for confirmation must be made to the Commissary Clerk of the county in which the deceased has died domiciled, or, where there is no Commissary Clerk, to the Sheriff Clerk (or their respective deputies); or, where the deceased has died domiciled furth of Scotland, or without any fixed or known domicile, to the Commissary Clerk of Edinburgh.

**Procedure.** From information supplied by the applicant in regard to the estate left by the deceased, and the character in which he may be entitled to confirmation, the clerk prepares and fills up the inventory and oath and relative revenue statement in the prescribed form. If the clerk has reason to believe the value of the estate exceeds the limit within which the procedure under the Small Estates Acts is competent, he shall refuse to proceed until he is satisfied as to the true value thereof.<sup>1</sup> The clerk may also require such

<sup>1</sup> Act of 1875, § 5; Act of 1876, § 5.

proof as he may think sufficient to establish the identity and relationship of the applicant.<sup>1</sup> "Relationship" in the extended application given to these Acts must be held to mean the applicant's title to the office of executor whether arising under a will of the deceased or by kinship or otherwise. The kind of proof required in practice is the evidence of two witnesses who attend with the applicant and whose depositions are taken by the Clerk, and recorded with the inventory and oath. Where the applicant claims under a will, the document itself, if validly executed, will prove his title, on his identity with the person named therein being established. In cases where caution is required the cautioner generally attends with the applicant when the oath is taken, and signs the bond, and may also be one of the witnesses of the applicant's identity and relationship. Applicants in these cases have seldom much difficulty in finding caution to the full amount, but when restriction is required it must be applied for by petition in the usual way. It is no part of the clerk's duty to prepare such a petition. Where the estate to be administered exceeds £100 the usual stamp of 5s. must be impressed upon the bond. Where the applicant is a married woman the consent of her husband is required to be appended to her oath. Where the applicant is a creditor or funerator the statutory notice is required to be inserted in the *Gazette*, and a copy is produced before confirmation is issued. The inventory, having been duly deponed to and stamped, where a stamp is required, is recorded, and confirmation expedited and delivered to the applicant on payment of the fees. Should the seal of the Probate Court of England or Ireland be necessary to complete a title to any estate contained in the confirmation, it is obtained by the Clerk, before delivering the confirmation to the applicant, transmitting it to the Registrar

<sup>1</sup> Act of 1875, § 4; Act of 1876, § 4.

CHAP. VII. of the Court whose seal is required, along with a fee of 2s. 6d.<sup>1</sup>

Ordinary  
procedure  
competent.

The procedure under the Small Estates Acts is not compulsory. But when the inventory and oath are prepared by the applicant himself, or by his agent, and thereafter lodged with the Clerk of Court, the confirmation issued will be, in the case of an executor-nominate, not a confirmation-nominate but a testament-testamentar, and in the case of an executor-dative, not a confirmation-dative but a testament-dative; and, in the case of an executor-dative, the giving up of the inventory must be preceded by a decerniture on petition, the fees of which are not covered by the confirmation fee. And if the seal of the English or Irish Probate Court is required, it will have to be obtained otherwise than through the Clerk of Court.

Under the Small Estates Acts only gross value is dealt with. There is no deduction of heritable or moveable debts or funeral expenses. Where an insurance policy has been assigned in security of a debt it must be valued at the full amount. But a deceased's interest in a copartnery may be valued at the amount due to him after deducting his share of the liabilities of the firm.

Additional  
estate.

Where confirmation has been issued under the Small Estates Acts, and additional estate is afterwards discovered, the amount of which, when added to that already given up, does not exceed the limit within which confirmation under these Acts is competent, application may be made to the Clerk of Court to prepare an additional inventory, and to issue an eik under the same conditions as an original confirmation. But where the estate discovered when added to that originally given up exceeds the limit within which confirmation under these Acts is competent, the practice has been adopted of granting a title to such estate in the form of a confirmation *ad omissa*, which confers a distinct title to

<sup>1</sup> Act of 1875, § 3; Act of 1876, § 3.

the estate contained in it, in no way affecting or depending CHAP. VII.  
 upon the validity of the previous confirmation, though  
 granted it may be in favour of the same person. Where  
 the original confirmation has been granted in favour of an  
 executor-nominate, he may apply for a testament-testamentar  
*ad omissa* by preparing and giving up an inventory and oath  
 setting forth the circumstances under which it has become  
 necessary. Where the original confirmation has been in  
 favour of an executor-dative, he will require, before giving  
 up his inventory, to apply by petition for decerniture as  
 executor-dative *ad omissa*. Only the newly discovered  
 estate is confirmed, the original confirmation still remaining  
 a sufficient title to the estate contained in it.

It is held that no application can be received under the Competi-  
tion.  
 Small Estates Acts where there is any competition for the  
 office of executor. Should competition arise, a petition must  
 be presented to the Sheriff, and a record made up in common  
 form (Duncan, 31st October 1889). Should a petition be  
 presented to the Court no application to the Clerk would be  
 received until the petition had been disposed of.

By the Act of 1894, § 23 (7), it is provided that "an Certifica-  
tion of pro-  
bates, etc.  
 application under the Small Estates Acts may be made to  
 any Commissary Clerk, and any Commissary Clerk shall affix  
 the seal of the Court to any representation granted in Eng-  
 land or Ireland upon the same being sent to him for that  
 purpose, enclosing a fee of two shillings and sixpence."  
 These provisions remain as yet without practical effect, except  
 that where an English or Irish probate or administration  
 issued under the statutes relating to small estates in England  
 or Ireland, bears that the deceased died domiciled in England  
 or Ireland, as the case may be, and is sent or presented  
 to the Commissary Clerk of Edinburgh, along with a full  
 copy thereof, he may endorse thereon the certificate neces-  
 sary to make it an effective title to estate in Scotland for a  
 fee of two shillings and sixpence (Appendix xxvi.).

## CHAP. VII.

Revenue  
officers to  
act for  
applicants.

By the Executors (Scotland) Act 1900, § 9, applications for confirmation under the Small Estates Acts may now be made in Scotland as in England to certain Inland Revenue officers appointed for the purpose. Such officers are authorised to fill up the necessary forms, stamp them when duty is payable, take the oath of the applicant thereto, and transmit the application, along with the prescribed fee, to the Clerk of Court where confirmation falls to be granted, and on the confirmation being returned to them, deliver the same to the applicant without further charge. Instructions have been prepared by the Inland Revenue Department for the guidance of such officers, and are about to be issued. The places at which applications may be made to Revenue officers under this section are given in Appendix XXVII.

## Fees.

The fee chargeable under the Small Estates Acts for the inventory being prepared and filled up by the Commissary or Sheriff Clerk or by a Revenue officer, and all duties incident to the issue of confirmation, are as follows:—When the amount of the estate which may be confirmed does not exceed £20—5s., and 1s. for each £10, or part of £10, after the first £20, but the total fee is not to exceed 15s.<sup>1</sup>

Return of  
duty.

It should be understood that, though return of the fixed duties on small estates cannot be *claimed* yet in practice, if it turns out on examination of a corrective inventory in the legacy duty office, that an estate is in fact reduced to below £100 by debts or funeral expenses, the duty paid is returned, and where the 50s. duty has been paid, and it is shown that the duty on the true value is only 30s., the difference is returned on application by the executor.

<sup>1</sup> Acts of 1875, 1876, and 1881, and Act of Sederunt, 20th Dec. 1898.

## CHAPTER VIII.

### CAUTION.

It was at one time the practice to exact caution from all executors, whether nominate or dative, to the full amount of the inventory to be confirmed. But by the Act of 1823 it was enacted that, from and after the 1st day of January 1824, caution should not be required to be found by executors-nominate, and that in all other cases the Court granting confirmation should fix the amount of the sum for which caution should be found by the person or persons to whom confirmation should be granted, not exceeding the amount confirmed.<sup>1</sup> Caution therefore still requires to be found by all executors-dative; even factors and curators, who have already found caution as such, must before being confirmed as executors again find caution for their intromissions in that capacity.

But though caution by an executor-dative cannot in any case be altogether dispensed with (Preston, 11th March 1874), the amount at which it may be fixed is entirely within the discretion of the Court. Where an executor offers caution to the full amount of the inventory no application to the Court is necessary, but where restriction is desired the executor must present a petition stating shortly the extent of the inventory to be confirmed, the amount to which he is desirous the caution should be limited, and the grounds on which his demand is founded, and this petition is disposed of by the Court in a summary manner with a due

CHAPTER  
VIII.  
—  
Who must  
find cau-  
tion.

Amount  
may be  
restricted.

<sup>1</sup> 4 Geo. IV. c. 98, § 2, App. v.

**CHAPTER VIII.** regard to the circumstances of the case, as prescribed by the Commissaries' Instructions of 31st December 1823<sup>1</sup> [FORM 55].

**Grounds for restriction.**

A petition for restriction of caution usually sets forth the inability of the applicant to find full caution, the amount of the debts, and whether or to what extent these and the funeral expenses have been paid, who are entitled to share in the succession, their relationship to the deceased, and the amount of their shares, and whether and to what extent the parties interested consent to the application being granted. It has been held that where the next of kin are the children of the deceased, descendants of predeceasing next of kin are entitled only to a share of the dead's part, not of the whole estate left by the deceased, and that caution required to protect their interests may be restricted accordingly (Petrie, 26th Feb. 1890).<sup>2</sup>

**Consents to restriction.**

Under an order by the Commissary dated 13th March 1862, when consent is alleged, written evidence of it must be produced. Where the consenter is from any cause unable to write, a verbal statement to the Clerk of Court, and certified by him, has been accepted (Durward, 9th Nov. 1885; Thorburn, 27th Dec. 1886). Consent must be personal by the beneficiary and not by his agent (Scott, 28th Feb. 1879), but consent by a factor or attorney as well as by an agent will be accepted if he is specially authorised to grant it (Stewart, 25th Nov. 1885). Consent by a *curator bonis* or other legal guardian is sufficient (Szillassy, 12th Nov. 1886), and consents by minors themselves may also be produced, though the effect to be given to them will depend on the age of the granter (which should always be stated), and other circumstances in each case. Under the Guardianship of Infants Act 1886,<sup>3</sup> the mother of pupil children

<sup>1</sup> Appendix vi.

<sup>2</sup> Bell's *Dict.*, *Legitim.*

<sup>3</sup> 49 and 50 Vict. c. 27; Jack v.

N. B. Railway Co., 17th Dec. 1886,  
14 R. 263.

acting as their guardian is held entitled to consent to restriction on their behalf (Nimmo, 3rd Nov. 1886). And when the mother of beneficiaries who are in pupillarity is the executor, she is not held bound to find full caution for their shares. But in a case where the estate was over £60,000, and the whole fell to the widow and her three pupil children, she being their sole guardian, caution was required to be found by her as executor to the extent of one half the amount falling to the children.

In disposing of an application for restriction of caution where no objections have been lodged, the general rule subject to modification according to the circumstances of each case is that where the debts have been paid and all the beneficiaries are of age and represented either as petitioners or consenters, caution to the extent of from five to ten per cent. of the amount confirmed is held to be sufficient. But where these conditions are not fulfilled, the sum will not be limited to less than will be sufficient to secure the interests of creditors and beneficiaries from whom consents have not been obtained. And this rule has been affirmed by the Supreme Court in a case from the Commissariat of Lanarkshire where the estate of the deceased had been sequestrated, and after the debts were paid there remained in the hands of the trustee a large balance which fell to be divided among a great number of next of kin. The whole of these next of kin, with the exception of two who were insane, had been decerned executors-dative, but were not in circumstances to find caution to the full amount. The Court remitted to the Sheriff with instructions to confirm the persons decerned, on their finding caution to the extent of two twenty-fifth parts of the amount of the inventory, being the amount of the shares of those next of kin who were not confirmed.<sup>1</sup> In the case of a French administrator, where there were no debts and no legatees in this country, and the estate in

<sup>1</sup> Bell v. Glen, 28th June 1883, not reported.

CHAPTER  
VIII.

France was sufficient to meet all claims there, on evidence that by the law of the domicile no security was required from the administrator, the caution was restricted to the nominal sum of £5, though the amount of the estate to be confirmed in Scotland was very considerable (De la Lastra, 21st Oct. 1889; De la Torre, 21st Oct. 1889). Where the deceased was a domiciled Englishwoman, and her husband had been decerned her executor and alleged that he was entitled by the law of England to her whole personal estate, and the inventory given up by him included a heritable bond,—it having been questioned whether the bond would go to him or to the next of kin, restriction was craved and granted only to the amount in the bond (Mayhew, 14th March 1887).

Objections  
to restric-  
tion.

An objector who alleges a relevant claim is not required to prove it. Where the whole estate was £15,000, and restriction was craved to £300, an objector alleged that he had a claim for £5000 under a settlement which the executor did not admit to be valid. The Commissary Depute fixed the caution at £5000, but the objector appealed on the ground that under the deed he founded on there were other legatees who would have an equal claim on the security, and that his interest could only be secured by full caution. The Commissary sustained the appeal and refused restriction (Morison, 13th Nov. 1873); but the deed founded on having been reduced by the Supreme Court, the caution was ultimately fixed at £300 as originally craved (23rd June 1874). Where an objector alleged that the deceased had not fully accounted for certain funds which he had held as trustee, restriction was refused (Wilson, 13th May 1875). Restriction has been refused to an executor-creditor even where no one appeared to object (Nicolson, 9th Nov. 1871).

Who may  
be cau-  
tioners.

Cautioners must be resident in Scotland, or otherwise subject to the jurisdiction of its Courts, and not beneficially

interested in the succession. A cautioner who, though resident in England, was a member of a Scotch mercantile firm has been accepted (Dudgeon, 23rd April 1862). The rule against accepting a beneficiary as cautioner is intended to provide against collusive appropriation of the estate by two or more of the beneficiaries without full intimation to all parties having interest. It is considered that a cautioner who has no interest except to see that all possible claims are satisfied affords the best guarantee that the functions of the executorial office will be faithfully performed. Female cautioners have always been objected to, and this practice was sustained in an appeal to the Supreme Court.<sup>1</sup>

Two or more cautioners may be conjoined in the bond, but they are taken bound jointly and severally, and each is attested as good for the whole obligation ; but where two cautioners have been offered, neither of whom could be attested for the full amount, the liability of each has been in one or two cases limited to one-half of the estate confirmed.

Where the executor is unable to offer any private individual in Scotland as cautioner, it has become the practice to accept a public company subject to the jurisdiction of the Scotch Courts, under a special warrant of the Sheriff obtained by petition in each case [FORM 56].<sup>2</sup> No company is accepted as cautioner in a confirmation which has not been accepted in the Supreme Court or approved by the Accountant of Court. In cases under the Small Estates Acts where the gross estate is not over £500, the Commissary Clerk is authorised by the Sheriff to accept any company which has already been accepted, without a special application.

Formerly all cautioners resident within the Commissariat were required to attend at the Commissary Office and sign

Companies  
as caution-  
ers.Bonds of  
caution.

<sup>1</sup> French's *Executry*, 16th May 1871, 9 M. 741.

11 R. 676, and 26th Nov. 1884, 12 R. 184 ; Harley, 20th March 1888,

<sup>2</sup> See M'Kinnon, 8th March 1884,

Outer House, S.L.R. 25, 445.

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an act of caution in the bond-book of the Court, their sufficiency being attested in a separate document; and this form of bond was held to bind the subscriber, though neither holograph nor attested.<sup>1</sup> This form of obligation is still competent; but since the passing of the Stamp Act of 1870, by which a stamp-duty of 5s. must be impressed on the bond in all cases where the estate to be administered exceeds £100 in value, and the separate bond being generally more convenient, the act of caution has fallen into disuse and a separate bond is used in every case. It is not the practice to require the executor to sign the bond, though, from its terms, it would appear to have been originally intended that this should be done. By the terms of the bond both executor and cautioner subject themselves to the jurisdiction of the Court in which the confirmation is granted, and appoint the clerk's office as a domicile whereat they may be cited to all diets of Court, at the instance of all and sundry having interest therein. The effect of this clause now may be considered doubtful, though the old form is still adhered to.<sup>2</sup> The bond is prepared by the Clerk of Court after the name of the cautioner has been submitted. Blank bonds are not issued. As the stamp-duty depends on the amount not of the obligation but of the estate to be administered, it will be payable wherever the sum confirmed is over £100, though the caution may have been restricted to a less sum. A form of attestation by a Justice of the Peace is appended to the bond, and this attestation is generally held to be sufficient, but will not preclude further enquiry where the circumstances seem to require it [FORM 74]. A bond by the widow, child, father, mother, brother, or sister of any common seaman, marine, or soldier slain or dying in the service of His Majesty is exempt from stamp-duty.

It has been decided that the septennial prescription does

<sup>1</sup> *Smith v. Kerr*, 30th Oct. 1868,  
7 M. 42.

<sup>2</sup> *Halliday*, 17th Dec. 1886, 14 R.  
251; but see *Sh. C. Reports*, vi. 43.

not apply to bonds of caution for executors-dative;<sup>1</sup> but the cautioner may be relieved from his obligation by the actings of the beneficiaries and executor, if not by mere delay in calling him to account.<sup>2</sup>

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Prescrip-  
tion of  
bonds.

<sup>1</sup> Gallie v. Ross, 4th March 1836,  
14 S. 647.

<sup>2</sup> Macfarlane v. Anstruther, 10th  
Nov. 1870, 9 M. 117.

## CHAPTER IX.

### FORM AND EFFECT OF CONFIRMATION.

**CHAP. IX.** CONFIRMATION in favour of an executor-nominate is called a testament-testamentar, and in favour of an executor-dative, a testament-dative: when issued under the Small Estates Acts, these documents are named respectively a confirmation-nominate and a confirmation-dative.

Names of confirmations.

Earlier forms.

In the earlier forms of the testament-testamentar, the settlement of the deceased was ingrossed or annexed as in an English probate, and both testament-testamentar and testament-dative contained an inventory of the estate to which a title was desired. By two Acts of Sederunt,<sup>1</sup> passed in pursuance of the Act of 1823,<sup>2</sup> abridged forms of confirmation were prescribed, in which the settlement was omitted from the testament-testamentar, and the inventory was in all confirmations to be held as repeated *brevitatis causa*, or might be in such terms as the executor should require, provided always the whole amount of the estate was confirmed. These forms continued in force down to 12th November 1858, but for some years before that date the confirmation, in Edinburgh at least, had come in practice to include in every case a full copy of the inventory of estate confirmed.

Statutory forms.

By the Confirmation and Probate Act 1858,<sup>3</sup> it was enacted that confirmations should be in the form, or as nearly as might be in the form, of schedules annexed to the

<sup>1</sup> 20th Dec. 1823, and 25th Feb. 1824.

<sup>3</sup> 21 and 22 Vict. c. 56, § 10, and Schedules D and E, Appendix VIII.

<sup>2</sup> 4 Geo. iv. c. 97, §§ 17, 18.

Act, and that such confirmations should have the same force CHAP. IX.  
and effect with the like writs framed in terms of the Acts of  
Sederunt above referred to, or "at present in use." The  
form of confirmation thus prescribed by the Statute makes  
no provision for including the inventory, or any part of it.  
It merely narrates that an inventory of the personal estate  
and effects has been given up and recorded, and the total  
value thereof, and gives the executor power to uplift, receive,  
administer, and dispose of the said personal estate and effects.

When the Act came into operation, frequent objection was  
taken to accept a confirmation in the statutory form as <sup>Forms in  
use include</sup> a inventory.  
complete title, in respect that it furnished no evidence that  
the particular item of estate to be uplifted or transferred was  
included in the sum confirmed. The result was that an  
extract of the inventory upon which the confirmation had  
proceeded was in almost every case taken out along with the  
confirmation. These extracts could only be issued at that  
time upon paper, each sheet of which was stamped with  
2s. 6d. In answer to a representation made to the Board  
of Inland Revenue on the subject, it was suggested that if  
the inventory could be inserted or incorporated in the con-  
firmation, it would not be liable in stamp-duty. Thereupon  
the Commissary of Edinburgh, on 4th June 1860, authorised  
the statutory form to be altered by prefixing a title—"Testa-  
ment-Testamentar (or Testament-Dative) of umquhile," etc.  
—immediately after which, the inventory was introduced by  
a heading to the effect that—"The deceased had pertaining  
and resting-owing to him at the time of his decease"—and  
a reference to the inventory was inserted in the body of the  
confirmation itself as being "before written." And this form,  
embodying a complete copy of the inventory confirmed, is  
still in use. It remained competent, of course, for any  
executor to require that his confirmation should be in the  
statutory form without containing the details of the invent-  
ory; but this was very seldom asked for.

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Changes in  
statutory  
form.

Another change in the statutory form of the confirmation was introduced in consequence of its being enacted in 1860 that inventories should be stamped with duty according to the value of the property contained therein, not as formerly at the date of the death, but at the date of oath, including the proceeds accrued thereon down to that date.<sup>1</sup> This made it necessary that both values should be set forth in the inventory, as the form of confirmation narrating the inventory required that the value should be stated as at the date of death. To obviate the trouble and inconvenience thus occasioned, the officers of Inland Revenue submitted the matter to Crown counsel, who issued an Opinion, dated 23rd January 1861, that it was sufficient to set forth the value of the estate as at the date of oath, and not also at the date of death, and that the statutory form of confirmation must be modified in order to be in accordance with the more recent Statute of 1860 by leaving out the words "at the time of his death." Forms giving effect to this opinion were approved by the Commissary of Edinburgh on 1st May 1861, and continued to be used till September 1863, when the Registrars of the English Probate Court, who had during the intervening period sealed confirmations in the altered form without question, refused to do so on the ground that such confirmations were not in accordance with the Statute of 1858. It was ascertained, however, that if the omitted words were reinserted, the registrars would not object to an addition to the statutory form to the effect that the inventory given up included the proceeds accrued on the estate to the date of oath. On the matter being reported to the Commissary, though he considered the omission of the words "at the time of his death" fully justified, yet "in order to expedite public business," he, on 1st October 1863, authorised the adoption of the alteration which the Registrars had agreed to accept. And though the objection of the Registrars

<sup>1</sup> 23 and 24 Vict. c. 80, § 5.

to the omission of the words was shortly afterwards overruled CHAP. IX.  
 by the Judge of the Probate Court,<sup>1</sup> the change to which it  
 led was adhered to. Other changes in the forms were  
 rendered necessary by the Sheriff Court Act of 1876, abolish-  
 ing the Commissary Courts and transferring their jurisdiction  
 to the Sheriffs as such ; and more recently by the Finance Act  
 1894, which reverted to the date of the death instead of the  
 date of oath, as that at which the estate of a deceased should  
 be valued for duty, and by the Executors Act 1900, § 5,  
 which made it compulsory that the inventory should form  
 part of the confirmation. In Edinburgh, where the inventory  
 had already been embodied in the confirmation no change  
 was necessary, but its inclusion became imperative instead of  
 optional [FORMS 75, 76].

Confirmation confers upon an executor full power to uplift, Effect of  
confirmation.  
 receive, administer, and dispose of the personal estate and  
 effects contained in the inventory given up by him, and upon  
 which his confirmation proceeds ; to grant discharges thereof,  
 if needful to pursue therefor, and generally every other thing  
 concerning the same to do that belongs to the office of  
 executor-dative or of executor-nominate respectively,—subject  
 to the provision that he shall render just count and reckoning  
 for his intromissions with the said estate when and where the  
 same shall be legally required.

It has been held that even before confirmation an executor Executor  
uncon-  
firmed may  
sue.  
 is entitled to sue for the estate of the deceased. Where an  
 executor-dative had been decerned, but was unwilling to  
 incur the expense of confirming a doubtful debt until he had  
 ascertained how much, if any, he might be able to recover, it  
 was formerly the practice to obtain from the Commissary a  
 licence to pursue, which entitled the executor to establish, if  
 he could, the claim against the debtor. Such licences, how-  
 ever, fell into disuse, it having been decided that an extract

<sup>1</sup> In the goods of George James *Reports*, new series, ix. 454.  
 Hay, 1st Dec. 1863, *Law Times*

CHAP. IX. of the decree-dative was equivalent thereto. A disposition *omnium bonorum*, or a nomination of executor by the deceased, and even probate or letters of administration from a foreign Court, are held to have the same effect. But the rule is that no executor can enforce payment, or grant an effectual discharge, until he has obtained confirmation,<sup>1</sup>—that being the only conclusive evidence that he is the person entitled to administer, that he has satisfied the claim of the government for duty, and that he has found caution for his intrusions to the satisfaction of the Court in cases where caution is required. By the Inland Revenue Act 1884,<sup>2</sup> as amended by the Inland Revenue Act 1889,<sup>3</sup> an exception was created in favour of certain policies of insurance, which was held to involve also their exemption from inventory duty (page 150), but the general law, subject to the exception referred to, was affirmed as follows:—"Notwithstanding any provision to the contrary contained in any local or private Act of Parliament, the production of a grant of representation from a Court in the United Kingdom by probate or letters of administration or confirmation shall be necessary to establish the right to recover or receive any part of the personal estate and effects of any deceased person situated in the United Kingdom." And it has been decided by the House of Lords that any person paying or transferring funds in this country belonging to a deceased, to an executor who has not obtained such representation in respect thereof, thereby renders himself liable to payment of the estate duty thereon.<sup>4</sup>

Executor  
cannot dis-  
charge  
until con-  
firmed.

Partial  
confirma-  
tions.

The debt or other estate claimed by the executor must be included in the sum confirmed, and it must be confirmed at its full value. Partial confirmations were formerly very common (page 117 *et seq.*). After executors had become

<sup>1</sup> Erskine, 3. 9. 39; Chalmers' Tra. v. Watson, 12th May 1860, 22 D. 1060; Bones v. Morrison, 21st Dec. 1866, 5 M. 240; Hinton, etc., v. Connell's Tra., 6th July 1883, 10

R. 1110.

<sup>2</sup> 47 and 48 Vict. c. 62, § 11.

<sup>3</sup> 52 and 53 Vict. c. 42, § 19.

<sup>4</sup> Att.-Gen. v. New York Breweries Company, 1899, A.C. 62.

bound by Statute to include the whole estate in their inventory and pay duty thereon, it became the almost universal practice to mention in the confirmation all the items of the deceased's estate at their full amount, as set forth in the inventory upon which duty was paid, but to confirm each only to a very small extent—generally to the extent of from £1 to £10. This was done in order to avoid the heavy *ad valorem* dues then exigible, but such partial confirmation did not give the executor right to enforce payment of any more than the amount confirmed. Debtors might pay, and in most cases it would appear did pay, but they had always the option of insisting upon a confirmation to the full amount of their debts. If they did insist, the executor was obliged to expedite an eik to his confirmation, which he could do at any time on finding additional caution and paying the legal dues, if no one with a better title to the office appeared. If, however, the debtors waived their right and paid more than the sum confirmed, they rendered themselves liable to repeat the payment of the unconfirmed portion of their debt to any one who might apply for confirmation of it and be preferred to the original executor. Where a sum of £1000, deposited in bank, had been paid to an executor-dative *qua* next-of-kin, on a confirmation of that sum to the extent of £20, it was held that the bank was bound to pay £980 to an executor-nominate who afterwards appeared and claimed the money.<sup>1</sup> Though partial confirmations, as formerly understood, are now unlawful in every case except that of an executor-creditor, decisions with reference to them would appear to be equally applicable to confirmations in which, from any cause, the estate to be recovered is omitted or undervalued. Where an executor had included in the

CHAP. IX.  
Partial  
confirmations.

<sup>1</sup> *Buchanan v. Royal Bank*, 30th Nov. 1842, 5 D. 211. The earlier cases are fully referred to in the Lord Ordinary's *Notes*. See also *Taylor v. Forbes & Co.*, 9th June

1827, 5 S. 785,—reversed H.L., 14th Dec. 1830, 4 W. and S. 444; *Smith's Trustees v. Grant*, 27th June 1862, 24 D. 1142; *Erskine*, 3. 9. 30, 36, 37; *Bell's Lectures*, 1132.

CHAP. IX. inventory he had confirmed an item on which he stated he could put no value until the claim was constituted, it was held that the confirmation was a good title to sue, but that it would be necessary to add the amount to the inventory before extract.<sup>1</sup> In another case, however, where an executor had stated a debt at £38, 18s. 6d. in the inventory confirmed, but valued it at £9, he was held entitled to sue, and on obtaining decree, to charge for the entire sum.<sup>2</sup> The soundness of this decision has been doubted, on the ground that "it enables an executor-dative to uplift the whole of a debt undervalued, without finding caution for the surplus."<sup>3</sup> But no question being raised except as regards stamp duty, the sufficiency of the confirmation on other grounds does not appear to have been considered.

Act of  
indemnity.

In regard to the responsibility incurred by debtors in paying upon a confirmation in which their debt has been omitted or undervalued in the sum confirmed, it is important to observe the provision of the Confirmation and Probate Amendment Act 1859, to the effect that all persons or corporations, who in reliance upon any instrument purporting to be a confirmation granted under the Confirmation and Probate Act 1858, shall have made, or permitted to be made, or shall make or permit to be made, any payment or transfer *bond fide* upon any such confirmation, shall be indemnified and protected in so doing notwithstanding any defect or circumstance whatsoever affecting the validity of such confirmation.<sup>4</sup> It would thus appear that any debtor paying on a confirmation in the form prescribed by that Act—that is, without any inventory being embodied or appended, and showing only the total sum confirmed—might, unless he knew or had reason to doubt that his debt was not included, be indemnified

<sup>1</sup> *Williamson v. Fraser*, 13th Nov. 1832, 11 S. 7.

<sup>2</sup> *Brown v. Millar*, 16th Dec. 1853, 16 D. 225.

<sup>3</sup> *Alexander's Practice of the Commissary Courts*, 53.

<sup>4</sup> 22 Vict. c. 30, § 1, Appendix x.

in so doing. But where the inventory is presented to the debtor along with the confirmation, as it now must be under the Executors Act 1900, § 5, in every case, and shows that his debt has been either omitted or undervalued, and the debtor chooses to pay, he does so at his own risk.

Though heritable securities which have been made personal *quoad* succession are, and must be, confirmed like other personal estate, confirmation is not of itself a complete title to discharge or assign them as it would be to discharge a purely personal obligation or transfer stock. For such securities still remain heritable *quoad* the debtor therein, who has the right to require that the title presented to him shall be such as will discharge a heritable obligation. Accordingly provision is made by Statute for the confirmation being made the basis of a heritable title both in testate and intestate succession (page 131). In intestate cases the confirmation is essential as a step in the title, but in testate cases, the title may also be made up by the disponees or legatees, or by the trustees and executors as such, without reference to the confirmation. It was at one time doubted whether a bond with a special destination should be included in a confirmation as moveable estate at all, in respect the Act provides that the executor can only take what the heir-at-law would have taken, and in this case he would have taken nothing (Napier, 3rd June 1873). But on a petition being presented for a warrant to include in a confirmation a heritable bond taken in favour of the deceased, whom failing A. and B. and their children, it was granted on the ground that, there being no express exclusion of executors, the bond must be treated as personal succession and included in the confirmation (Barr, 26th Sept. 1873). The confirmation in such a case could not of course confer on the executor any title to the contents of the security. But as in the case of a purely personal bond or investment taken by a deceased with a special destination, and of which he remains undivested at his death, the

CHAP. IX.  
Indemnity  
doubtful.

Confirmation  
of  
heritable  
securities.

CHAP. IX. executor may be bound to include it in his inventory and confirmation, though he must give effect to the destination (page 141), by handing over the document to the beneficiary, who, as heir of provision under the destination, may complete his title by service.<sup>1</sup>

Vitious  
intromis-  
sion.

Confirmation operates as a complete protection from the penalties of vicious intromission. These penalties include liability on the part of the intromitter for the whole debts of the deceased. What intromission is to be regarded as vicious is not very clearly defined. Mere continuance in the possession of estate belonging to a deceased, or even taking possession of it for the purpose of its preservation, or for any other necessary or equitable purpose, does not constitute vicious intromission. There must be something from which fraud or misappropriation may be proved or presumed. Estate which has been confirmed may be intromitted with by any one without vitiosity, and where there has been vicious intromission, the vitiosity may generally be purged by a subsequent confirmation if such confirmation be expedite within a year after the death. Vicious intromission is pleadable only by creditors and not by legatees.<sup>2</sup>

Confirma-  
tion of  
English  
and Irish  
estate.

The conditions under which English or Irish estate may be included in an inventory, and in the supervening confirmation, have been already explained (page 121). In order that the confirmation may become an active title to uplift and transfer such estate, the clerk who signs it must insert therein or note thereon a statement that the deceased died domiciled in Scotland—it being a sufficient warrant for him to do so that the fact has been set forth in the affidavit to the inventory—and the confirmation, if it includes personal estate in England, must be produced in the principal Court of Probate in England, and, if it includes personal estate in Ireland, in the Court of Probate in Dublin, and a

<sup>1</sup> Hare, 25th Nov. 1889, 17 R. 105.

<sup>2</sup> Erskine, 3. 9. 49-56; Bell's *Commentaries*, i. 705, ii. 81.

*Principles*, 19, 21; Bell's *Commentaries*, i. 705, ii. 81.

copy thereof deposited with the registrars, who must then seal it with the seal of the Court in which it is produced, and return it to the person producing it, and thereafter the confirmation has the same force and effect as if a probate or letters of administration, as the case may be, had been granted by the Court in which it has been sealed.<sup>1</sup>

CHAP. IX.

Confirmations are sealed in the English and Irish Probate Courts as a matter of course.<sup>2</sup> Shortly after the passing of the Act of 1858 a case occurred in the Probate Court in England in which the sealing of a Scotch confirmation was objected to by the next of kin on the ground that the deceased had an Anglo-Indian and not a Scotch domicile, and that the will which had been confirmed, though good according to Scotch law, was not a valid English will. The Judge (Sir C. Cresswell) said that the Act imposed upon the Court merely a ministerial duty, its object being to give the Scotch Court power to grant a probate which would operate over the whole kingdom. If there was any remedy it must be sought in Scotland, as he did not think the Act gave him any authority to interfere.<sup>3</sup>

Sealing in Probate Court.

It is only when included in an inventory along with Scotch estate that English or Irish estate can be confirmed in Scotland. It would be incompetent to issue a principal confirmation containing no Scotch estate, and if issued such a confirmation would not be sealed by the Probate Courts. It was even found that an eik containing only English estate, which it was held competent to issue in Scotland, could not be sealed unless the principal confirmation had included both Scotch and English estate, and had also been sealed.<sup>4</sup> But a remedy was provided by the Sheriff Court Act 1876. Any additional confirmation may now be sealed in the

Confirmation must contain Scotch estate.

<sup>1</sup> 21 and 22 Vict. c. 56, §§ 12, 13; 39 and 40 Vict. c. 70, § 41, Appendices VIII. and XIV.

<sup>2</sup> Walker's *Compendium*, 100.

<sup>3</sup> In the Goods of J. P. Cumming,

*Times*, 4th Aug. 1859. Reaffirmed by Justice Butt, *see* Penny v. Penny, 1891, 7 T.L.R. 403.

<sup>4</sup> Ryde's *Executry*, 21st May 1870; *Law Reports*, 138.

CHAP. IX. Probate Courts of England or Ireland whether the original confirmation has been sealed there or not, and although the additional inventory confirmed does not contain any Scotch estate.<sup>1</sup>

Where  
only trust  
funds in  
England  
or Ireland.

It was also found that although probate is frequently necessary in England where the deceased has had no estate of his own there, but holds funds in trust for others, the seal of the Probate Court could not, in these circumstances, be obtained. But a remedy in this case also was provided by the Statute of 1876. A note or statement of trust funds held by a deceased in England or Ireland, on being set forth in any inventory, recorded in the proper Court Books, may now be inserted in a confirmation or additional confirmation of personal estate in Scotland—or may be appended thereto—and signed by the clerk who issues or has issued the confirmation, and such confirmation may be sealed in the Probate Courts of England or Ireland, as the case may be, “in the same manner” as if it had contained personal estate due to the deceased beneficially. The fact that the deceased died domiciled in Scotland is set forth in the affidavit to the inventory and noted in the confirmation, and a copy of the confirmation is deposited with the registrar when the seal is applied for. On being sealed in the Probate Court the confirmation has the like force and effect in England and Ireland with respect to the trust funds as if probate or letters of administration had been granted by the Court in which it has been sealed.<sup>2</sup> Where the trust funds are noted in an original or additional inventory all that is necessary is to set forth in the oath that the deceased died domiciled in Scotland, and to crave that the note of trust funds may be inserted in the confirmation or eik in terms of the Act; and in the confirmation or eik the inventory is narrated as having a note of such trust funds set forth therein, and the note is inserted. But the remedy has been found available also

<sup>1</sup> 39 and 40 Vict. c. 70, § 42, Appendix xiv.    <sup>2</sup> 39 and 40 Vict. c. 70, § 43.

where the trust funds have been discovered after the inventory has been recorded and the confirmation issued, and where there is no additional estate to be confirmed. In this case a special supplementary inventory requires to be given up containing the necessary statement of trust funds, and craving that it be appended to the confirmation, which must be produced for the purpose [FORM 70A]. On this inventory being recorded the statement is endorsed on the confirmation, signed and sealed, with the usual note that the deceased died domiciled in Scotland. A confirmation in either of these forms has been held entitled to the seal of the Probate Court.

Probate in England or Ireland corresponds generally to testament-testamentar, or confirmation of executor-nominate in Scotland. Probate in common form is, like confirmation, granted on an *ex parte* application and without any formal procedure in Court. Both are revocable or reducible on cause shown; but until revoked or reduced each is conclusive evidence of the executor's title to receive the estate and grant discharges therefor. In England probate can be revoked in the Court that granted it; but in Scotland reduction of a confirmation, or of the will upon which it has proceeded, is competent only in the Supreme Court.<sup>1</sup> Probate in solemn form is a contentious proceeding, and its effect is the same as a decree of declarator in Scotland, establishing the validity of a will. A grant of probate, however, differs from confirmation in this respect, that while the latter has reference only to the appointment of executors, the former has reference to every part of the testamentary writing or writings in respect of which it is granted. In a confirmation it is only the nomination of executors that is confirmed, and only the deeds containing such nomination upon the validity of which any judgment is pronounced. But in a probate it is the whole contents of the will which

Probate,  
etc., com-  
pared with  
confirma-  
tion.

<sup>1</sup> Erskine, 1. 2. 6; 1. 5. 28.

CHAP. IX. are held to be proved, and the validity of every writing included in the probate, whether it relates to the nomination of executors or not, is held to be established. Letters of administration correspond generally to confirmation as executor-dative. Both are granted in cases where there is no executor-nominate. Where the deceased has left a will, it is proved by the administrator, and a copy thereof annexed to his title. All administrators (with or without a will annexed), like executors-dative, are required to find caution.<sup>1</sup>

Probates including Scotch estate.

Equivalent to confirmation.

By the Confirmation and Probate Act 1858, the effect of an English or Irish probate or letters of administration may be extended to Scotland by having a certificate endorsed thereon by the Commissary Clerk of Edinburgh, in the form prescribed by the Act. The probate or letters must have a note or memorandum written thereon, signed by the proper officer, stating that the deceased died domiciled in England or in Ireland, as the case may be, and a copy of the document must be deposited with the Commissary Clerk. And it is enacted that such probate or letters of administration, being duly stamped, shall be of the like force and effect, and have the same operation in Scotland, as if a confirmation had been granted there; it being also provided that such probate or letters of administration shall be deemed and considered to be granted for and in respect of the whole of the personal and moveable estate and effects of the deceased in the United Kingdom subject to duty.<sup>2</sup> The provision as to the probate or letters of administration "being duly stamped," is superseded by the Customs and Inland Revenue Act 1881, by which stamps are no longer impressed on such documents, but on the affidavit of value on which they proceed, and a certificate that the affidavit has been duly stamped is

<sup>1</sup> Tristram and Coote's *Probate Practice*, Part 1, c. v., Part 3, c. 1.; Jarman on *Wills*, 1. 26; Walker's *Compendium*, 93; Erskine, 1. 2. 6; Lord Neaves in *Stiven v. Myer*,

29th May 1868, 6 M. 885; *Dowie v. Barclay*, 18th March 1871, 9 M. 726.

<sup>2</sup> 21 and 22 Vict. c. 56, §§ 14, 15 Appendix VIII.

substituted for the stamp itself, and for all purposes probates and letters of administration with such a certificate thereon are to be deemed as having been duly stamped.<sup>1</sup> Under the Finance Act 1894 a receipt for the estate duty payable is substituted for the stamp. The copy which requires to be deposited with the Commissary Clerk is a plain copy of the whole document, including not only the grant but the will, where a will is annexed, and the certificate to be granted must be dated as well as subscribed by the clerk.<sup>2</sup>

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Probate and letters of administration formerly proceeded upon an affidavit setting forth only the total amount which the deceased's estate did not exceed. But since 1st April 1880, they proceed upon an account of the particulars of the personal estate for or in respect of which probate or letters of administration are to be granted, and the estimated value of such particulars.<sup>3</sup> This account, and an affidavit to which it is annexed, correspond generally to the inventory and relative oath upon which confirmation proceeds. But neither the probate nor letters of administration contain any of the particulars of the estate in respect of which they are granted, only the gross value of the estate and effects given up in the account being stated therein. No person, therefore, to whom they are presented as a title has any means of knowing from them whether the claim made against him has been included, or at what amount it may have been valued, unless, of course, where the gross value is less than the sum claimed.<sup>4</sup> But the indemnity granted by Statute to parties paying or transferring funds in reliance on a confirmation (page 210) is granted also to those paying or transferring funds in reliance on a probate or letters of administration when certified in Scotland, as well as on a confirmation sealed in the Probate Courts of England or Ireland.<sup>5</sup>

Estate not specified in probates.

Indemnity Act applies.

<sup>1</sup> 44 Vict. c. 12, §§ 26, 27, 30.<sup>3</sup> 43 Vict. c. 14, § 10.<sup>2</sup> Act of Sederunt, 19th March 1859, § 7.<sup>4</sup> Williams on *Executors*, 538.<sup>5</sup> 22 Vict. c. 30, Appendix x.

## TRANSMISSION OF TRUST FUNDS.

CHAP. IX. By the Executors (Scotland) Act 1900,<sup>1</sup> §§ 6 and 7, the law relating to the transmission of funds held by deceased persons not beneficially but for behoof of others, as trustees, executors, &c., has now been settled.

Transmission by executor-nominate of trustee. The former practice of appending to the inventory of a deceased's personal estate a note of the funds held by him in trust for others, and including the note in the confirmation, and using it as a title to recover such funds, though hitherto with little or no authority, has been sanctioned and regulated by the legislature in § 6. It provides that where a sole or last surviving trustee or executor-nominate has died with any trust or executry funds standing or invested in his name as trustee or executor-nominate, any person entitled to confirmation as his executor-nominate, may intromit with such funds under certain conditions and to a certain extent.

What funds may be so transmitted. The funds dealt with under this section must be "standing or invested" in the name of the deceased trustee or executor-nominate. Where funds such as stock or shares have not been transferred to the executor's name, but where the confirmation has merely been intimated to the company and noted in their books, the stock or shares cannot be said to be invested in his name. Such funds are still *in bonis* of the original defunct, and a title can only be obtained to them by a confirmation *ad non executi*.

Procedure and effect thereof. The executor must as formerly append to the inventory of the deceased's own proper personal estate, a note of the funds held by the deceased as trustee or executor-nominate, and such note must appear also in the confirmation. On these conditions the confirmation is declared to be "valid and available for recovering such funds." The executor therein

<sup>1</sup> 63 and 64 Vict. c. 55.

is thus entitled to receive and discharge the funds, but not to hold them and carry out the purposes of the trust. He is required to dispose of them at once, by assigning and transferring them—(a) to the persons legally authorised to continue the administration thereof; for example, to any substitute trustee appointed by the truster; or where no other act of administration is required, (b) directly to the beneficiaries entitled thereto; for example, where the sole or last surviving trustee or executor is the liferenter, and the estate is divisible on his death; or (c) to any person whom the beneficiaries may appoint to receive and distribute the same. CHAP. IX.

A probate granted in England or Ireland, and certified by the Commissary Clerk of Edinburgh, is to have the same effect as a confirmation with the note appended. When a probate is exhibited the note of trust funds is dispensed with. Where confirmation is founded on the note is essential. If it has been omitted from the original inventory and confirmation, an additional inventory may be given up, and an eik to the confirmation expedite. It is only when the note of trust funds is appended to an inventory “confirmed” that it becomes effectual as a title to such funds. Where no additional estate can be found, the estate previously confirmed has been given up at a small nominal increase of value, and the difference confirmed, with the note of trust funds appended (FORM 69). Note of trust funds.

The powers conferred by this section are not compulsory, and cannot be insisted on in competition with any other competent proceedings whereby a title to such funds can be completed. They are not available by an executor-dative, and do not extend to funds held by a deceased in that character. Where, therefore, no confirmation as executor-nominate can be obtained to a sole or last surviving trustee or executor-nominate, and where an executor-dative has died with the executry funds in his name, this section is not applicable. When powers available.

## CHAP. IX.

Transmission by confirmation *ad non executa*.

In former times the limits within which a confirmation *ad non executa* was considered competent, were not very clearly defined, and varied from time to time.<sup>1</sup> More recently the prevailing view had come to be that such a confirmation was limited to estate which had been confirmed but not uplifted, and was still *in bonis* of the original defunct, and that it could only be expedite by executors-nominate. But in the absence of any distinct authority these views were not universally adopted or acted upon. By § 7 of the Executors Act, its competency has been extended to all executry funds to which a title has been made up by confirmation, either as executor-nominate or executor-dative, where the executor has died or become incapable of acting, while the funds to which he had obtained a title remain unuplifted, or which, though uplifted, have not been transferred to the persons entitled thereto.<sup>2</sup> The section begins by providing that, except to the extent specified in the preceding section, no title to intromit with estate which has been confirmed shall transmit to the representatives of the executors in whose favour the confirmation has been granted. This provision has reference to the practice which had become prevalent of including in the inventory of an executor-dative, or of an executor-nominate who had confirmed partly, though not wholly, for his own behoof, any estate to which he had obtained confirmation, as if it were his own, subject to the claims of other beneficiaries, which claims were deducted as debts. This practice has now become inept, and the title to estate undistributed on the death of an executor-dative will pass not to *his* representatives but in all cases to those of the original

<sup>1</sup> Erskine, 3. 9. 38.

<sup>2</sup> The principle adopted in this section is the same as that which regulates the corresponding practice in England and Ireland. "So long as an estate or any part of it remains

unadministered after the death of any grantee, and the deceased is unrepresented in law, the (Probate) Division can make a supplementary grant to complete the administration" (Tristram and Coote, 9).

defunct on their obtaining a confirmation *ad non executa*, CHAP. IX.  
authorising them to take up and complete the administration.

The estate to be included in a confirmation *ad non* Estate ad non ex-  
ecuta. *executa* will consist of the whole executry estate contained in the original confirmation not fully administered, whether unuplifted or transferred to and standing in the previous executor's name, or uplifted and deposited or reinvested by him, and in so far as it remains distinguishable as part of the executry estate. "It is the office of an executor to carry the testament (confirmation) into execution in order to distribute the executry effects amongst all having interest in them."<sup>1</sup> The duty of an executor is thus twofold. He has first to ingather and obtain possession of the estate to which he confirms, and then pay the debts and make over the residue among the persons entitled to it. Until both of these functions have been performed, the administration is incomplete. It is accordingly provided that confirmation *ad non executa* shall be a sufficient title to continue and complete the administration of the whole estate confirmed but not distributed.

The section provides that confirmation *ad non executa* Executors ad non  
executa. shall be granted like the restricted form of confirmation *ad non executa* formerly competent, to the same persons, and according to the same rules as confirmations *ad omissa*,<sup>2</sup> that is, to the persons who in their order, at the date of the application, would have been entitled to take out an original confirmation, if confirmation had not already been expedited.

This section is applicable to all executry funds, except To what funds section in-  
applicable. funds confirmed by an executor-creditor, as therein provided. But it is not applicable to trust funds, other than testamentary, which, where § 6 is not available, can only be dealt with under the provisions of the Trusts Act 1867;<sup>3</sup> or it may be by declaratory adjudication.<sup>4</sup>

<sup>1</sup> Erskine, *supra*.

<sup>2</sup> See Chapter x.

<sup>3</sup> 30 and 31 Vict. c. 97.

<sup>4</sup> Bell's *Lectures*, 1135.

CHAP. IX.      A grant of probate or of letters of administration made in England or Ireland, and certified in Scotland, has the same force and effect as the corresponding titles testament-testamentar or testament-dative, granted in Scotland.<sup>1</sup> In both cases the certificate is held to be the equivalent of confirmation, but the effect in the case of a probate will be that of a testament-testamentar, and in the case of letters of administration that of a testament-dative. Where therefore a grant of probate which included stock in a Scotch bank had been certified in Scotland, and the executors had intimated the probate to the bank and it was noted in their books, but the stock had not been transferred to the executors' names, it was held competent on the death of all the executors to expedite a confirmation *ad non executam*, as if the stock had actually been confirmed in Scotland, in favour of the executors of the last surviving executor, who by the law of England are entitled to continue the administration (page 78). This course would have been equally competent under the new Act if the stock had been transferred to the executors' names, though in that case § 6 might also have been made available.

Letters of  
adminis-  
tration.

But where letters of administration including Scotch estate have been sealed in Scotland in respect thereof, and the administrator has died without having uplifted the estate, or has left it standing in his name as administrator, the result will be the same as if he had been confirmed executor-dative, and the title to continue the administration of the estate will pass not to his representatives, but to the representatives of the original defunct. And such representatives may complete their title, where the estate in England also remains not fully administered, by obtaining in England a grant of administration *de bonis non*<sup>2</sup> (which corresponds to *ad non executam* in Scotland) of the English and Scotch estate un-

<sup>1</sup> 21 and 22 Vict. c. 56, § 14.

<sup>2</sup> Williams on *Executors*, pt. 1. B. 5, c. 3, § 2.

administered, and thereafter sealing the grant in Scotland; CHAP. IX.  
 or, when the estate in England has already been fully  
 administered, by confirmation *ad non executa* in respect of  
 the Scotch estate alone. And the procedure will be the same  
 where a last surviving executor-nominate has died without  
 naming an executor. The title to the executry funds vests  
 not in *his* executor-dative, but in the executor *ad non*  
*executa* of the original defunct.

A confirmation sealed in England or Ireland has, if a Confirmation sealed in England or Ireland.  
 testament-testamentar, the same force and effect as a  
 probate, and if a testament-dative the same force and effect  
 as letters of administration granted in these countries, as  
 regards trust and executry funds.<sup>1</sup>

Where a testament-testamentar includes English or Irish Testament-testamentar.  
 estate, and is sealed in London or Dublin, and the executor  
 dies before the estate has been fully administered, the right  
 to continue the administration will pass to his executors-  
 nominate if any, on their confirmation being also sealed, the  
 two sealed confirmations forming their title. The funds are  
 usually noted at the end of the inventory in the confirmation,  
 but this does not appear essential in England or Ireland  
 when any of the proper personal estate of the deceased con-  
 firmed is situated in these countries, and the confirmation is  
 on that ground sealed in the Probate Courts. Nor does it  
 appear necessary that the funds should be standing or in-  
 vested in the deceased's name as trustee or executor. In  
 many investments trusts are not recognised, and the investors  
 are dealt with as the actual proprietors. In order to realise  
 such investments, affidavits as to the fact of trust, in statu-  
 tory form, are required to be presented along with the  
 confirmation.<sup>2</sup> The chain of executors-nominate may go on  
 indefinitely until the administration is complete, but if any  
 executor dies intestate, the chain is broken, and the executry

<sup>1</sup> 21 and 22 Vict. c. 5, §§ 12, 13;  
 39 and 40 Vict. c. 70, § 43.

<sup>2</sup> 48 Geo. III. c. 149, §§ 35, 36, 37;  
 55 Geo. III. c. 184, § 50.

CHAP. IX. funds vest not in *his* administrator, but in the administrator *de bonis non* of the original testator.<sup>1</sup>

Testament-  
dative.      Where a testament-dative had been sealed in England in respect of estate situated there, and the executor-dative died before the administration was complete, it was found necessary and competent to take out in the Probate Court letters of administration *de bonis non* in respect of the funds unadministered, though no similar title could then be granted to them in Scotland.<sup>2</sup> In the same circumstances it would be competent now to expedite confirmation under the Executors Act, and seal it in the Probate Court.

It will be observed that there are many cases in which the procedure under either of these sections may be adopted. And where a title to uplift the funds has been obtained under § 6, and there is any dubiety about the persons to whom they should be transferred, a confirmation *ad non executam* under § 7 might solve the difficulty.

#### COLONIAL PROBATES ACT.

To what  
places  
applicable.      By the Colonial Probates Act 1892,<sup>3</sup> provision is made for reciprocity in the matter of title to executry estate between British possessions abroad and the United Kingdom, similar to that already established between Scotland, England, and Ireland. The possessions to which the Act applies are fixed by Order in Council on evidence that such possessions have made corresponding provisions as regards titles granted in the United Kingdom. By § 3 the operation of the Act is extended to British Courts in a foreign country, such as the Consular Courts in Turkey and China.

Sealing in  
Scotland.      Any probate or letters of administration granted by a Court to which the Act applies may on certain conditions be sealed in the Sheriff Court of Edinburgh (and also in London and Dublin) and thereupon shall be of the like force and effect

<sup>1</sup> Lewin on *Trusts*, 225.

tram and Coote, 166.

<sup>2</sup> White, 17th March 1887, Tris-

<sup>3</sup> 55 Vict. c. 6, Appendix xx.

and have the same operation as if confirmation had been CHAP. IX. granted by that Court.

The conditions under which Colonial grants may be sealed Procedure. in Scotland and the procedure to be followed, are regulated by an order of Court by the Sheriff of the Lothians and Peebles, dated 9th June 1893, made under powers conferred by § 2 (5) of the Act.<sup>1</sup> An inventory is required to be given up along with the document to be sealed and a full copy thereof. The inventory is in ordinary form, and the oath is varied to suit the circumstances, re-sealing being craved instead of confirmation [FORM 63 (a)]. The oath must set forth the domicile of the deceased, and should it appear doubtful whether, on this or any other ground, the applicant would have been entitled to confirmation, a warrant to seal must be obtained from the Sheriff. Where letters of administration are presented for sealing, caution must be found as in Caution. the case of an executor-dative. In all cases, on the application of any creditor of the deceased, the Court may require that adequate security should be given for the payment of debts in the United Kingdom. The Commissary Clerk in sealing the document shall note thereon the amount of estate in Scotland and the Act under which it is sealed. Where an order in Council has been obtained, the Act is applicable to grants made either before or after its passing.

Where the deceased has died domiciled abroad with estate Estate Duty. in England or Ireland to which a title is required, the grant of probate or administration must be sealed also in these countries. Payment of estate duty on the whole estate in the United Kingdom is made where the seal is first applied for, and in any subsequent application, a certificate is granted by the Inland Revenue that the duty has been paid. Where the application is under § 3, and estate duty is exigible on the personal estate wheresoever situated, the whole duty

<sup>1</sup> Appendix xxi.

**CHAP. IX.** must be paid in this country, and application made for return of any duty paid on the original grant.

**Copies.**

The oath is almost always taken by an attorney or mandatory for the executor or administrator with the necessary power [FORM 72]. Both in Edinburgh and in London, it is held that any certified copy produced under § 2 (4) of the Act must contain a complete copy of the grant, a mere exemplification of the will bearing that it has been proved, though it might be a sufficient warrant for confirmation, is not entitled to be re-sealed.

**Colonial Sealing.**

The Colonial Acts giving corresponding privileges to British grants of confirmation, probate, etc., in the Colonies, are all in similar terms, and the re-sealing is carried through under the like conditions and with the like force and effect. For the purpose of being sealed in any Court where sealing is competent, the document sent from Scotland is either the confirmation itself or a duplicate thereof, or an extract of the confirmation without the inventory, and where there is a will it is usual to send also an extract thereof. Though it forms no part of a confirmation, the will, where there is one, is always annexed to the grant both of probate and of letters of administration, and it is generally considered safer that where a confirmation is to be used as a substitute for these titles, it should be accompanied by an authenticated copy of the will.<sup>1</sup>

<sup>1</sup> The following is a list of British possessions to which the Act has been made applicable by Orders in Council under § 1 :—Cape of Good Hope, New South Wales, Victoria, New Zealand, Gibraltar, British Honduras, Hong Kong, Western Australia, Province of Ontario, British Guiana, Gold Coast Colony,

South Australia, Straits Settlements, Bahama Islands, Barbadoes, Lagos, Tasmania, Fiji, Trinidad and Tobago, Jamaica, Natal, Falkland Islands, British Columbia, Nova Scotia, Leeward Islands, Manitoba, N.W. Territories (Canada), Grenada, St. Vincent, Queensland, St. Helena.

## CHAPTER X.

### ADDITIONAL INVENTORIES AND CONFIRMATIONS.

By the Revenue Act of 1808 it was provided that if at any period subsequent to the recording of the original inventory a discovery should be made of any other effects belonging to the deceased, an additional inventory or additional inventories of the same should, within two calendar months after the discovery thereof, be, in the same manner as an original inventory, exhibited upon oath or solemn affirmation by any person or persons intronitting with or assuming the management of such effects, which additional inventory or inventories should also be recorded in manner aforesaid. And it was also enacted that where any such additional inventory should be exhibited to be recorded as aforesaid, the same should also specify the amount or value of the estate and effects of the same person comprised in any former inventory or inventories.<sup>1</sup> As by § 42 of the same Act an executor is only entitled to recover estate which has been included in an inventory, it may be necessary to give up an additional inventory, even though no additional duty is payable, and this must of course be done in all cases where further confirmation is required.

CHAP. X.  
Additional  
inven-  
tories.

In giving up an additional inventory it is competent at the same time to correct any error that may have been made in the original inventory. Estate which has been over-estimated may be set forth at its true value, and the difference deducted, and should any item have been

Corrective  
inven-  
tories.

<sup>1</sup> 48 Geo. III. c. 149, §§ 38, 40, Appendix III.

CHAP. X. erroneously included, that also may be deducted. The schedule of debts may also be amended either by addition or deduction so as to bring out the true value of the estate. And where no debts have previously been deducted, a schedule thereof may be appended to an additional inventory. Where in the interval between giving up the original and additional inventories, return of duty has been obtained on the ground of debts, the amount returned must be taken into account in adjusting the duty. And where inventories have been received at the Stamp Office without being recorded, the estate they may have contained must be included in any additional inventory afterwards given up for confirmation, and the duty paid accordingly, or a certificate from the Inland Revenue written thereon that the duty has been paid [FORMS 65, 66].

Eiks to  
confirmation.

It was always competent for an executor who had expedited a partial confirmation to add or eik thereto any additional item of estate, or the additional value of any item, to which he might require a title. By the Act of 1823, which abolished partial confirmation, it was declared to be still competent to eik to the original confirmation any estate that might afterwards be discovered, provided the whole of such estate so discovered should be added.<sup>1</sup> If confirmation of the additional estate is required, and no part of the estate has been previously confirmed, as there can be no partial confirmation, the whole must be included in the confirmation craved, which will in that case, of course, not be an eik but the principal confirmation, though proceeding on an additional inventory. If confirmation has been already obtained, and the additional inventory is given up by the executors already confirmed, or by any persons whom they may have competently assumed to act along with them, the additional estate may be confirmed in the form of an eik, which, though a separate document, is really an addition to the original

<sup>1</sup> 4 Geo. IV. c. 98, § 3, Appendix v.

confirmation. A substitute executor has in some instances expedie an eik (Murray, 1st Feb. 1886), but a confirmation *ad omissa* would appear to be the more correct form of title. The amount of the estate already confirmed is narrated in the eik, but the sum confirmed and title granted are limited to the additional estate only. The first eik applied for is so named, but there may be a second and a third eik, and more if required [FORM 78].

CHAP. X.

Corrective eik.

Where estate contained in the original inventory and confirmation has been inaccurately entered or described in such manner that it cannot be uplifted by the executors,—where, for example, an item has been entered as Scotch instead of English estate,—the remedy is to give up a corrective additional inventory, in which, after setting forth the amount in the original inventory, and deducting therefrom the value of the estate incorrectly given up therein, such estate is set forth as new or additional estate under the head of effects omitted. If correctly valued in the original inventory, no further duty is exigible, and an eik is issued in ordinary form containing the corrected entry [FORM 69].

*Ad omissa vel male apprehiata.*

Confirmation *ad omissa vel male apprehiata* is competent where any estate has been omitted or undervalued in the original confirmation. Any person having interest may apply for it, but he must call the principal executor confirmed as a party, and if it appears that the executor has neither left out of the confirmation nor understated any subject contained in it, *dolose*, the subjects omitted or the difference between the estimations in the principal confirmation and the true value may be added as an eik thereto.<sup>1</sup> Where one next of kin had been confirmed, and another applied to be decerned *ad omissa*, and claimed to be a creditor on the executry estate, alleging that the executor had omitted a debt due by himself, which, however, the

<sup>1</sup> Erskine, 3. 9. 36, 37; Norris *Executor* No. 6.  
v. Law, 6th Dec. 1738; Elchies'

CHAP. X. executor refused to admit, both were decerned executors-dative *ad omissa*, but as they could not agree as to the estate to be given up, confirmation could not be proceeded with, and a judicial factor was appointed (Campbell, 13th Oct. 1879). But where a next of kin applied for appointment as executor-dative *ad omissa* either alone or along with another next of kin already decerned and confirmed, the application was refused, no sufficient ground being set forth why the executor already confirmed should not be allowed to expedite an eik, which he was willing to do, and continue the administration (Turnbull, 13th March 1885). Where the principal executor, however, is an executor-creditor, he is not entitled to prevent another creditor being decerned and confirmed *ad omissa*; but he may be conjoined with him in such confirmation.<sup>1</sup> Confirmation *ad omissa* is the competent form of title where, in consequence of the death or resignation of all the executors originally confirmed, an eik cannot be obtained, and where a title is required to some item of estate omitted or undervalued in the original confirmation, and which therefore still remains *in bonis* of the defunct<sup>2</sup> (Warrender, 11th Jan. 1884; Jazdowski, 19th March 1889).

Executors  
*ad omissa*.

Confirmation *ad omissa vel male apprehiata* may be issued in favour of the same persons as would be entitled to an original confirmation. Any substitute executor or testamentary-trustee or other person entitled to confirmation as executor-nominate would be entitled in the first place,—whom all failing, the next of kin, legatees, or other beneficiaries, in their order, entitled to decerniture as executors-dative. Such confirmation must, like an eik, contain the whole of the estate not already confirmed, unless when expedite by an executor-creditor. The estate to which a title is sought

<sup>1</sup> Lee v. Donald, 17th May 1816,  
19 F.C. 118; Smith's Trustees v.  
Grant, 27th June 1862, 24 D. 1142.

<sup>2</sup> Aitkinson v. Learmonth, 14th  
Jan. 1808, 14 F.C. 76.

may have been given up in an inventory of which a creditor CHAP. X.  
 has expedé a partial confirmation, or in an additional inventory of which no confirmation has been issued, but in so far as it is unconfirmed the new executor is entitled and, unless a creditor, bound to confirm the whole, the terms "*ad omissa*" and "*male appretiata*" having reference to the contents not of the inventory but of the confirmation. If already given up and the full amount of duty paid, it will only be necessary for the new executor to give up in his inventory *ad omissa* the unconfirmed portion of the estate, without paying any duty thereon, and crave confirmation thereof (Bradley, 4th June 1884). But if the estate requiring to be confirmed has not already been included in any recorded inventory it will fall to be given up in the inventory *ad omissa* as additional estate and duty paid thereon. But a confirmation *ad omissa* differs from an eik in this respect, that it is not a mere addition to the previous confirmation but an independent title to the estate it contains, and the previous confirmation is not narrated, nor are its contents referred to. But a confirmation *ad omissa* is a good title to call upon the representatives of any previous executors to account for such portions of the deceased's estate as they may have intromitted with or included in their inventory but not confirmed.<sup>1</sup> It has been decided that it is not necessary for a creditor or next of kin to be confirmed *ad omissa* in order to call upon the original executor to account for funds in his possession, though not included in his confirmation.<sup>2</sup> [FORMS 51, 65, 66, 80, 81].

Inventory  
*ad omissa*.Confirmation  
*ad omissa*.

Confirmations *ad non executata* have already been dealt with in connection with the transmission of trust funds (page 220). The estate therein will not be limited as formerly to funds which had been confirmed but not uplifted, or

Confirmation  
*ad non executata*.

<sup>1</sup> Nicol v. Wilson, 10th June 1856, 18 D. 1000. 7 R. 1013; see also Torrance v. Bryson, 24th Nov. 1841, 4 D. 71;

<sup>2</sup> Smith v. Smith, 24th June 1880, Erskine, 3. 9. 36.

CHAP. X. transferred to his own name, by an executor-nominate. The inventory given up and confirmed will include the whole estate of the deceased already confirmed which remains not fully administered [FORM 68]. The executors *ad non executa* will be the same persons as are entitled to be executors *ad omissa*. If they are not entitled to confirmation as executors-nominate, they will require in the first place to obtain decerniture as executors-dative [FORM 52].

Sealing of  
eiks, etc.

Where any additional confirmation has been granted, whether an eik, confirmation *ad omissa*, or confirmation *ad non executa*, containing English or Irish estate, it is entitled to be sealed in the principal Registries of the English and Irish Probate Courts in the same manner as an original confirmation.

Reswearing  
of pro-  
bates.

Where estate in Scotland has been included in a grant of probate or letters of administration in England or Ireland and sealed in Scotland, any additional Scotch estate afterwards discovered may be given up and a title thereto obtained in the Court where the original grant was made. This is done by having the amount of the estate resworn and a marking to that effect made on the probate which is again exhibited in Edinburgh and certified by the Commissary Clerk.

Correction  
of duty.

Corrective inventories are frequently necessary though there may be no additional estate to give up and confirm, in order to adjust the payment of estate duty. The following regulations are issued by the Inland Revenue in regard to these inventories :—

1. The deposition should be made by the executor personally. No return of duty can be made except on the executor's own deposition, or if he is dead, upon that of the executor upon his estate.

2. In cases where *too little* duty has been paid the Corrective Inventory must be presented at an Inland Revenue Office for stamping, within two calendar months after the discovery of the mistake, and the deficient duty and interest paid. Before calculating the amount of the additional duty, correction can be made of any insufficient

deduction in respect of debts and funeral expenses. But allowance can not be *claimed* for the fixed duty of 30s. or 50s. on estates originally treated as not exceeding £300 or £500 respectively in value. Interest upon the amount of the deficient duty must also be paid. When the duty and interest have been duly paid the corrective inventory should be *at once* lodged with the Commissary or Sheriff Clerk, if it contain any additional executry estate of which confirmation is, or may be competently required; if it contains no such estate, the corrective inventory should be *at once* forwarded to the Deputy-Controller of Legacy Duty, Edinburgh, asking that same may be filed without being recorded. Attention to the speedy disposal of corrective inventories will prevent unnecessary application to the parties liable.

If any person who ought to deliver the corrective inventory shall neglect to do so within the term prescribed by law, namely, within two months after the discovery of the mistake, he will render himself liable to pay either £100 or double the amount of unpaid duty for which he is accountable, as the Commissioners may elect.

3. In cases where *too much* duty has been paid, written application should be made, with full explanation of the circumstances, to the Deputy-Controller of Legacy Duty, Edinburgh, the corrective inventory (duly deponed to) being sent therewith. Such application can be made at any time within three years after the recording of the inventory whereon the duty was overpaid; or where, by reason of legal proceedings, the debts due shall not have been paid or the assets not recovered and made available, within such further period as the Commissioners may allow.

Where return of estate duty is claimed on ground of debt or incumbrance, it will require to be shown that same are within the allowance authorised by § 7 (1) and (2) of the Finance Act 1894.

Upon the claim being established, and all death duties then due having been paid, the warrant for the return of estate duty will be submitted to the Commissioners of Inland Revenue. The Comptroller of Stamps and Taxes, Edinburgh, will notify the result to the parties.

## CHAPTER XI.

### RECORDS—EXTRACTS—CALENDARS.

**CHAP. XI.** THE earlier records of all the Commissary Courts in Scotland are now deposited in the General Register House, Edinburgh, those of the old inferior Commissary Courts down to the abolition of these Courts in 1823, and those of the Commissary Court of Edinburgh down to the year 1830, when its jurisdiction was restricted to the county of Edinburgh. The Commissary Court-books were at one time a competent record for all deeds with a clause of registration, and for probative writs registered under the Act of 1698, and also for protested bills and promissory notes under the Act of 1681. By an Act passed on 12th May 1809, the recording of all such writs in the Commissary Courts after the expiration of six months from the passing of the Act was declared to be unlawful.<sup>1</sup> The proper Commissary records relating to the confirmation of executors, originally consisted of (1) a register of decrees-dative, and (2) a register of testaments or confirmations, both testamentary and dative. There was no separate register of inventories and testamentary deeds previous to 1804, these documents having been recorded only along with the confirmation in which, according to the forms then in use, both were engrossed ; but by an Act passed in that year it became necessary to record inventories and relative testamentary deeds, whether confirmation was required or not.<sup>2</sup> Accordingly a special register was then instituted

Old  
records.

Register of  
inventories  
and testa-  
mentary  
deeds.

<sup>1</sup> 49 Geo. III. c. 42, § 2.

<sup>2</sup> 44 Geo. III. c. 98, § 23.

in which were recorded all inventories and deeds exhibited under that Act, relating to the estates of persons dying previous to 10th October 1808. A new register of inventories and testamentary deeds, relating to the estates of persons dying after 10th October 1808, was begun under the Act of that year,<sup>1</sup> and has been carried on continuously down to the present time. The provision of the Act of 1804 requiring inventories and wills to be given up and recorded having been repealed in 1870,<sup>2</sup> there is now no statutory authority for recording an inventory or will in the cases of persons who may have died previous to 10th October 1808 ; but as the statutory form of confirmation narrates that the inventory (and will if any) upon which confirmation proceeds have been recorded in the Books of the Court in which it is granted, the Sheriff has in such cases authorised, by special warrant, the documents to be recorded in the current register with the warrant prefixed (M'Ghie, 26th May 1886 ; Ingram Ball, 24th Jan. 1888). Though for convenience the inventories and deeds are now kept in a separate series of volumes, they are held to constitute one register, it being incompetent to record any testamentary writing except as an adjunct to an inventory.

Notwithstanding the amalgamation of the Commissary with the Sheriff Courts in 1876, the records of the Commissariat are still distinct from those of the county or sheriffdom. Inventories and relative testamentary writings are not recorded in the ordinary Sheriff Court books, but in the Register of Inventories and Deeds instituted as above mentioned, and are described in the confirmation as being recorded not in the Sheriff Court books but in the Court books of the Commissariat. To describe them as recorded in the Sheriff Court books would be incorrect and misleading. A deed recorded in the Sheriff Court books is registered for preservation, and is retained in the custody of the Court, an

Records of  
Commissariat not  
Sheriff  
Court  
books.

<sup>1</sup> 48 Geo. III. c. 149, § 38.

<sup>2</sup> 33 and 34 Vict. c. 99.

CHAP. XI. extract only being given out. Inventories and relative deeds are recorded for revenue purposes and as the grounds upon which confirmation may be issued, and after they have been recorded are delivered up, the former to the Stamp-Office and the latter to the ingiver.

Extracts  
from the  
records.

Extracts from the records signed by the Clerk of Court, and sealed with the seal of the Commissariat, are made and issued—of any decree-dative ; of a confirmation, either with or without inventory ; of an inventory and relative testamentary writings ; of an inventory alone ; or of testamentary writings alone. Extracts of testamentary writings from these records, however, are not regarded as having the same effect as extracts from a Register of Probative Writs, but only as certified or authenticated copies. In extracting testamentary writings alone, they are always described in the preamble as having been exhibited along with an inventory of the personal estate, and the whole of such writings are included in the extract as together constituting the deceased's will. Extracts are required chiefly for the purpose of instructing in a colonial or foreign Court an executor's title to administer the deceased's estate. For this purpose, an extract of the confirmation without including therein the inventory confirmed, accompanied in testate cases by an extract of the testamentary writings recorded with the inventory, is generally found to be sufficient. Extracts, besides being signed by the Clerk and sealed, may, when required, be also certified by the Sheriff,<sup>1</sup> and when they are to be founded on in a

<sup>1</sup> Certificate by Sheriff (or Substitute) as to signature of Commissary Clerk or Depute:—"I, \_\_\_\_\_, Esquire, Sheriff \_\_\_\_\_ of the Sherifffdom of the Lothians and Peebles, which includes within its jurisdiction the Commissariat of the County of Edinburgh, hereby certify that \_\_\_\_\_, whose signature appears to the foregoing extract,

is Commissary Clerk \_\_\_\_\_ of said Commissariat, that the Seal thereunto annexed is the Seal of said Commissariat, and that said Extract is thus duly authenticated according to the law and practice of Scotland. —Signed by me at Edinburgh and the Seal of said Commissariat affixed this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_."

foreign Court should be authenticated by the Consul of the country in which they are to be used. CHAP. XI.

Full copies of all probates, and letters of administration, and letters of administration with the will annexed, granted in England or Ireland, which have been produced in the Sheriff Court of Edinburgh, and certified by the Commissary Clerk under the Confirmation and Probate Act 1858, are in terms of the Act deposited in the Commissary Office, and are open to the inspection of all persons desiring to see the same, and copies or excerpts of these documents are made by the Clerk when required. Copies of documents sealed in the Commissary Office under the Colonial Probates Act 1892,<sup>1</sup> are deposited and retained in custody of the Clerk of Court. Abstracts of petitions for the appointment of executors published by the Keeper of the Record of Edictal Citations are also preserved, and made patent to all persons desiring to see the same.<sup>2</sup>

The wills of soldiers of Scotch domicile and whose estates have been administered without confirmation or probate, under the Regimental Debts Act 1863,<sup>3</sup> are, as required by that Statute, deposited with the Commissary Clerk of Edinburgh. A printed calendar of all confirmations granted in Scotland, and of inventories recorded of which no confirmation has been required, alphabetically arranged, is prepared annually by the Commissary Clerk of Edinburgh from returns furnished to him quarterly by the Clerks of all the other Commissariots in Scotland. The calendar was instituted by the Sheriff Court (Scotland) Act of 1876,<sup>4</sup> and commences with that year. It gives in each case the name and designation of the deceased and the place and date of death, the names and designations of the executors, the date of confirmation or of recording the inventory, the date of the will or deed if any, Soldiers' wills.  
Calendar of confirmations.

<sup>1</sup> 55 Vict. c. 6.

<sup>3</sup> 26 and 27 Vict. c. 57.

<sup>2</sup> Act of Sederunt of 19th March 1859, Appendix ix.

<sup>4</sup> 39 and 40 Vict. c. 70, § 45.

**CHAP. XI.** and where and of what date the same was recorded, and the value of the estate. In terms of the Act and under the authority of the Treasury, copies of the calendar are deposited for public inspection in every place in Scotland from which confirmations are issued (page 6), in the General Register House in Edinburgh, and in the Probate Courts of London and Dublin.

**Calendars of probates, etc.** Calendars containing similar particulars of all probates and letters of administration issued in England and Ireland are prepared in these countries, and a copy thereof from the year 1858, when they were commenced, is deposited in the office of the Commissary Clerk of Edinburgh.<sup>1</sup>

**Searches.** Searches for any documents which may be recorded or deposited in the Commissary Office are made when required, and any such document, if found, may be inspected or copied by the person by whom the search is ordered without any charge beyond the fees of search.

<sup>1</sup> 20 and 21 Vict. c. 77, § 68.

## CHAPTER XII.

### JUDICIAL PROCEEDINGS.

ALTHOUGH all confirmations proceed in name of the Sheriff, CHAP. XII. there is in the great majority of cases no special reference to the judge, the proceedings being conducted in the office of the Clerk of Court, whose duties correspond to those of the Registrars in the Probate Courts in England and Ireland.

The direct intervention of the judge is necessary only in Judicial applications. the following applications:—(1) For appointment of executors-dative, or for recall of such appointment; (2) for restriction of caution; (3) for special warrant to issue confirmation, where a caveat has been entered and objections lodged, or where there is any specialty or cause of doubt in respect of which the Clerk of Court declines to proceed without the authority of the Court; (4) for warrant to seal or examine the repositories of a deceased; and (5) for commissions to take oath or to take evidence. In most of these applications there is no defender or respondent; but they are not therefore granted as a matter of course. Each is considered on its merits, and granted only upon grounds which the judge may deem sufficient,—the forms of procedure being as far as possible the same as in ordinary actions before the Sheriff Court.

The form of petition for appointment of executor prescribed by the Confirmation and Probate Act 1858,<sup>1</sup> and the forms of other petitions in commissary causes in use previous to the passing of the Sheriff Court Act of 1876 have in practice been Form of petitions.

<sup>1</sup> 21 and 22 Vict. c. 56, § 2, Appendix VIII.

**CHAP. XII.** superseded by the last-mentioned Statute which provides that  
**Form of** "every action in the ordinary Sheriff Court shall be com-  
**petitions.** menced by a petition, in one of the forms, as nearly as may be, contained in Schedule A" annexed to the Act.<sup>1</sup> None of the forms in Schedule A is specially adapted to applications for the appointment of executor, or to any other application in a commissary cause. But it was decided by the Supreme Court, interpreting this section of the Act with reference to other applications in the Sheriff Court not specially provided for in the Schedule, that the section applies,<sup>2</sup> and that in every "civil proceeding competent in the ordinary Sheriff Court," the petition must be framed in one of the forms prescribed in Schedule A annexed to the Act.<sup>3</sup> In the Bill Chamber it was held by Lord Fraser that a petition for sequestration presented in the Sheriff Court is incompetent if not in the form provided by the Act of 1876.<sup>4</sup> In the Second Division the same question as to the form of a petition for sequestration was raised but not decided,—Lord Young, however, indicating an opinion in favour of the view that the old form is not incompetent.<sup>5</sup> On the whole, these decisions support the contention that for all petitions in commissary causes the new form is competent, if not compulsory. In Lanarkshire it was decided that no other is competent.<sup>6</sup> The chief difference between the old form and the new other than the mere order of arrangement is, that the latter, while it embraces all the substantial requirements of the old form, contains also a distinct plea in law, and if signed by an agent, the agent must add his address. Even though it should be decided, therefore, that the old form is still in force, all the particulars required by

<sup>1</sup> 39 and 40 Vict. c. 70, § 6, Appendix xiv.

<sup>2</sup> M'Dermott v. Ramsay, 9th Dec. 1876, 4 R. 217.

<sup>3</sup> Crozier v. M'Farlane, 15th June 1878, 5 R. 936.

<sup>4</sup> National Bank v. Williamson, 8th April 1886, 23 S.L.R. 612.

<sup>5</sup> Cuthbertson v. Gibson, 31st May 1887, 14 R. 736.

<sup>6</sup> Johnston, 4th Sept. 1884, *Sheriff Court Reports*, vol. i. p. 314.

it are set forth in the new form, though in a different order, CHAP. XII.  
 while, if the new form should be held to be compulsory, the Form of  
 old would be manifestly defective. For these reasons the petitions.  
 forms appended to this work have been framed, "as nearly  
 as may be," in accordance with those prescribed by the Act  
 of 1876, embracing all the particulars required by the Act  
 of 1858.<sup>1</sup> It may be added that it is only the form of  
 petition for the appointment of executor that is prescribed  
 by the Act of 1858. For other commissary applications,  
 such as petitions for authority to issue confirmation, for  
 restriction of caution, etc., no special statutory form can be  
 pleaded as against the provisions of the Act of 1876. In  
 regard to the signing of petitions in the new form, it has  
 been held that signature at the end of the prayer is not neces-  
 sary; signature at the end of the whole writ is sufficient.<sup>2</sup>

The procedure in petitions for the appointment of execu- Intimation  
 tors has already been partly explained (pp. 111-14). The and indu-  
 intimation and *inducias* are still regulated by the provisions cia.  
 thereanent in the Statute of 1858. It has never been sug-  
 gested that these provisions are affected by the Act of 1876  
 —it may, indeed, be held that, at least as regards the inti-  
 mation of petitions, their effect is expressly reserved by the  
 44th section, which provides a new form for certifying the  
 intimation and publication required by the previous Statute.

On the first Court day after the expiry of the *inducias* the Procedure.  
 petition is enrolled by the Clerk, and called in Court, when  
 attendance must be given by the petitioner, or his agent, to  
 move for decree. All petitions, and any productions founded  
 on, are examined in the Clerk's office previous to the calling,  
 and if these are in proper form, and what is craved is in  
 accordance with the practice of the Court, decree is granted  
 at once. Should there be anything special in the applica-  
 tion, it is brought under the notice of the judge, who, before

<sup>1</sup> Dove Wilson's *Practice*, 543;  
*Lees' Styles*, 83, 158, notes.

<sup>2</sup> *Sharp v. M'Cowan*, 4th July  
 1879, 6 R. 1208.

CHAP. XII. deciding on the merits, may require such explanations, alterations, or amendments to be made by minute on the petition as he may consider necessary.

Competing  
Petitions.

Where appearance is entered by anyone who intends to compete for the office, or to apply to be conjoined in it, he must also forthwith lodge a petition, if he has not done so already, and nothing is done until the expiry of the *induciae* in the second petition, when both applications are enrolled and considered together. If the question raised is simply one of law, the Sheriff may at once conjoin the petitions, hear the parties, and decide the case; or he may appoint the question to be debated at some future time, and thereafter pronounce judgment. Where matters of fact are in dispute, the practice has been to allow a record to be made up in one of the petitions, and the case proceeds in every respect in the same manner as in other ordinary Sheriff Court actions, except that the term "answers" is used instead of "defences," and the term "respondent" instead of "defender"—the other petition being continued until the question in dispute has been decided, when both petitions are disposed of together. Where the objector does not intend to compete for the appointment, but simply to oppose the petitioner's application, he must lodge answers before the expiry of the *induciae*.

Recall of  
decerni-  
ture.

Where an executor has been decerned but not confirmed, and a petition is presented to recall the decerniture, and to conjoin or substitute the petitioner, special intimation must be made to such executor, who, if he wishes to oppose the application, must enter appearance at the calling, when the case will be decided, or further procedure ordered, as in a first application for appointment. It has been decided that an application of this kind is competent, even after the original decerniture has been extracted, but before confirmation, without the necessity of a reduction<sup>1</sup> [FORM 53].

When a petition for restriction of caution is lodged, an

<sup>1</sup> Webster v. Shireess, 25th Oct. 1878, 6 R. 102.

order is at once obtained on the petitioner to intimate the same by advertisements, generally in two newspapers, with a notification that objections must be lodged within ten days from the date of the advertisements. By an order of the Commissary, dated 26th Sept. 1870, the advertisements must specify the sum to which restriction is craved. When the ten days have expired, if no objections have been lodged, the petition, with a copy of the advertisements, which must be lodged by the party, with an inventory thereof and of any other productions in the cause, is at once transmitted to the Sheriff, who either grants the petition as craved, or appoints the solicitor to be heard, and thereafter decides as seems just and reasonable. Where objections have been lodged they are allowed to be seen by the petitioner, and unless the matter is arranged by the parties themselves, and the objections withdrawn, they are transmitted along with the petition to the Sheriff, who either at once or after hearing parties, fixes the amount of caution and decerns (page 200). Should the petition be refused or withdrawn, the objector may be entitled to expenses (Peacock, 8th March, 1889). Where an eik contained estate which had been included in an original confirmation but erroneously described, a restriction which had been granted was held to apply to the eik, and warrant was granted on the original petition to accept caution to the same extent as in the principal confirmation (Burns, 24th Dec. 1885) [FORMS 55, 62].

A caveat may be lodged against any application being received without notice to the person by whom or on whose behalf the caveat is lodged. A caveat does not of itself bar any proceeding. When the application is made against which the caveat is directed, intimation is given to the party by whom the caveat has been lodged, who must immediately, where the caveat is directed against the issue of confirmation, give in a note of his objections to the application being granted. Intimation is then made to the applicant that in

CHAP. XII.  
Restriction  
of caution.

Caveats  
and objec-  
tions.

**CHAP. XII.** respect of objections having been lodged, confirmation can be proceeded with only under the authority of the Sheriff. Unless the objector can be satisfied and the objections withdrawn, a petition must be presented meeting the objections and praying for authority to the Clerk to issue confirmation; and the Sheriff may at once appoint parties to be heard, and thereafter decide the cause, or he may order intimation to the objector, and ordain him to answer the petition as respondent, and the case will then proceed as an ordinary Sheriff Court action. Where the caveat is directed against the appointment of an executor-dative, the party on receiving intimation must enter appearance, and lodge answers or a competing petition; if the caveat is against restriction of caution, objections must be lodged when the application is intimated. Notwithstanding the failure of any opposition to an application, either on the merits or on the ground that the objector has no title to insist on his objection, the Sheriff may *ex proprio motu* refuse the application, should he consider there is sufficient ground for doing so [FORMS 60, 61, 9].

Petitions  
for special  
warrant  
to issue  
confirmation.

Although no caveat or objections have been lodged, a petition for special warrant may still be necessary, where there is any irregularity in the execution of the deed containing an appointment of executors founded on, or in the terms of the nomination; where the declinature or acceptance of any executor has not been ascertained, and it is necessary to proceed with the confirmation; or where there is any substantial informality in the inventory or oath. In these cases, of course, there is no respondent, unless it should appear to the Sheriff that intimation ought to be made to some person interested, such as the next of kin, when the validity of the deed is in question (Russell, 30th Nov. 1871). When such intimation is made and appearance entered, the procedure is the same as where a caveat has been lodged. But where no intimation is made, or, if made, where no appearance is entered, the Sheriff either grants the prayer of the petition.

at once, or, where it seems necessary, may order a proof CHAP. XII. before answer, or he may appoint the party to be heard before giving judgment [FORMS 1-9].

Petitions are submitted in the first instance to the Sheriff Appeals. Substitute, whose judgment can always be appealed against. The procedure in such appeals is in every particular the same as in ordinary Sheriff Court causes, with this exception, that when a cause relating to confirmation has been appealed to the Supreme Court and the appeal sustained, the Court does not itself pronounce judgment but remits to the Sheriff to do so in accordance with its directions.<sup>1</sup>

Applications for warrant to examine and seal a deceased's Petitions for warrant to examine and seal repositories and secure effects. repositories, to inspect his papers, and secure his effects, until it should appear who had right to take charge of his affairs, were, though not very frequent, competent in the Commissary Court, and may still of course be entertained by the Sheriff. Such applications may be presented by any party interested in the deceased's succession, such as a next of kin or creditor, or by any one who, though having access to, and, it may be, possession of, the repositories of the deceased, desires to be relieved of the responsibility of intermeddling with the deceased's papers or valuables while the amount or disposition of his property is unknown. The whole circumstances under which the interference of the Court is considered necessary must be fully set forth in the petition; and, before granting it, such intimation may be ordered as the judge may Intimation of Petition. consider expedient. Where a petition for the appointment of executor to the deceased had been presented, service was ordered on the party who had presented it (Thick, 15th Oct.

<sup>1</sup> Erskine, 1. 2. 6; 1. 5. 28; Jerdon v. Forrest, 23 Jan. 1897, 24 R. 395. In this case there was a competition between the next of kin and a person whom the deceased, in a holograph will, had named her "heir," the latter claiming as general

disponsee and universal legatory. The next of kin was ultimately preferred, in respect that the effect of the appointment as "heir" was doubtful, having regard to the other provisions of the will.

CHAP. XII. 1867). The warrant, if granted, is in favour of the Clerk of Court and his assistants, and is executed by them, though its execution may be carried out in presence of parties interested. Any will or testamentary writing, as well as any money, documents of debt, or articles of value, are taken possession of and removed for safe custody to the office of the Commissary Clerk, the repositories are sealed and the premises secured, and a report of the proceedings is made to the Sheriff and lodged in process. Should any will have been discovered containing a nomination of executors, such executors may obtain delivery of it and any property in the custody of the Commissary Clerk, on an order from the Court to that effect, which may be applied for by a minute in the process. Where a will was found naming four executors, three of them, being a majority, were held entitled to delivery of the deed, though the fourth executor, who had been with the deceased when he died abroad, had written to request that nothing should be done till his return (Littlejohn, April 1861). Where a holograph writing naming a residuary legatee but not appointing an executor was found, and the next of kin were afterwards decerned, a warrant was granted to the Clerk of Court to record the writing in the Books of Council and Session, and to deliver an extract to the executors (Macdonald, 6th June 1865). If no appointment of executors is discovered, the whole effects remain in the custody of the Clerk of Court until an executor-dative has been appointed, who, on his decerniture, obtains access to them to enable the inventory to be prepared; and after confirmation has been obtained, they are delivered up to him. Property in the custody of the Clerk was delivered to the *curator bonis* of a general legatee who had been decerned but not confirmed (Shand, 9th June 1870). And in a case where the effects were of very trifling value, authority was granted to deliver them to the agent of the next of kin even

Execution  
of warrant.

Procedure  
when will  
found.

Procedure  
when no  
will found.

before decerniture (Macpherson, 30th June 1880). After an executor had been confirmed, it was held incompetent for the Commissary to grant warrant to inventory and preserve effects alleged to have belonged to the deceased and claimed by his executor, but whose right thereto was denied by the parties who were in possession of the effects.<sup>1</sup> But it has been held competent to grant warrant at the instance of an executor decerned but not confirmed to examine repositories and make up an inventory of effects, access to which had been refused by the person in whose custody they had been left by the deceased (Mather, 6th Nov. 1864), and for this purpose to break open lockfast places, alleged to contain property of the deceased (Balgarnie, 4th March 1866).

CHAP. XII.  
Warrant  
incom-  
petent  
after  
executor  
confirmed.

<sup>1</sup> Milligan v. Milligan, 17th Jan. 1827, 5 S. 206.

## CHAPTER XIII.

### INVENTORY AND TEMPORARY ESTATE DUTY.

**CHAPTER XIII.**  
**Act of 1804.** INVENTORY duty is still exigible on the estates of persons who have died before 2nd August 1894. By the Revenue Act of 1804, stamp-duty was for the first time imposed upon the personal estate of deceased persons in Scotland. It was provided that, from and after the 10th day of October 1804, all persons who should intromit with the moveable estate of a deceased person should be bound to exhibit in the proper Commissary Court a full and complete inventory of such estate;<sup>1</sup> but in the schedule appended to the Act the stamp duty was made payable, not on the inventory, but on the confirmation. As there was no obligation upon executors to confirm the whole or any part of the estate contained in the inventory, if they had or could obtain possession of it otherwise, the Act failed in securing payment of the duty on the whole of the estate upon which it was intended to be levied. Accordingly, by the Act of 1808, the duties imposed by the previous Act were repealed, and stamp duty was imposed in the case of all persons dying after 10th October 1808, not on the confirmation but on the inventory, which all intromitters with the deceased's estate were required under penalties to exhibit and record in the Commissary Court, whether they wanted confirmation or not.<sup>2</sup> No alteration was made on the rate of duty imposed in 1804, and the stamp was continued on the confirmation in the case of persons who had died after the 10th October

<sup>1</sup> 44 Geo. III. c. 98, § 23.

<sup>2</sup> 48 Geo. III. c. 149, § 38, App. III.

1804, and before or on the 10th October 1808. Though the rate has been altered from time to time, these dates still regulate the incidence of the duty. No duty is payable on the inventories of persons who died previous to 11th October 1808 (Armstrong, 25th Sept. 1876; Skene, 19th May 1884); but although the provisions of the Act of 1804 requiring an inventory to be exhibited are now repealed,<sup>1</sup> in the event of confirmation being required in any case where the deceased died after 10th October 1804, and before 11th October 1808, a stamp might still require to be impressed upon the confirmation. In 1815 the scale of duties as Act of 1815. regards all inventories exhibited and recorded from and after the 31st August of that year, was materially altered, and the amount increased.<sup>2</sup> A distinction was also introduced between testate and intestate estates, the latter being subjected to a duty one half greater than the former. This distinction is believed to have been based on the assumption that, in testate succession, the estate would not always go to the nearest of kin, as it must do in intestacy, and that compensation would be obtained for the lower rate of inventory duty in the higher rate of legacy and succession duty. Whatever may have been the ground of the distinction, the scale of duties in which it was given effect to remained in force, with little alteration, down to the year 1880. In 1859 the graduation of the scale was carried beyond estates Act of 1859. of the value of one million, at which it had formerly ceased;<sup>3</sup> and in 1864 it was enacted that no stamp duty should be Act of 1864. chargeable on the inventory of any person dying after 25th July of that year, where the whole estate and effects did not exceed £100,—the “whole estate and effects” in this case being held to mean the estate and effects of which confirmation might competently be issued.<sup>4</sup>

<sup>1</sup> 33 and 34 Vict. c. 99.<sup>3</sup> 22 and 23 Vict. c. 36, § 1.<sup>2</sup> 55 Geo. III. c. 184 (*Schedule*),<sup>4</sup> 27 and 28 Vict. c. 56, § 5.

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XIII.  
Act of 1880.

By the Customs and Inland Revenue Act 1880, the scale then in force was entirely superseded, and a new scale imposed applicable to all inventories recorded on and after the 1st April 1880.<sup>1</sup> According to this scale, the distinction between the duties on testate and intestate succession was abolished, and one uniform rate levied in both cases. This scale, however, remained in force only until the 1st June 1881, when, by the Customs and Inland Revenue Act of that year, the whole matter of the inventory duty was re-arranged upon a new footing.<sup>2</sup>

Inland  
Revenue  
Act 1881.

The leading provisions of this last mentioned Statute as affecting inventory duty were the following:—(1) It was no longer necessary in all cases to pay the duty on the gross value of the assets of the deceased, and thereafter to apply for return of duty in respect of debts. The duty might be paid at the first only on the net value of the estate after deducting debts (page 170). (2) A fixed rate of thirty shillings might be paid on personal estates over £100 and not above £300 in gross value, to cover all charges of inventory, legacy, and succession duty thereon (page 190). (3) In all cases not falling under the thirty shillings rate, instead of a graduated scale of duties proceeding by wide intervals of value, there was substituted a fixed rate of 2 per cent. on all estates above £100 and not above £500;  $2\frac{1}{2}$  per cent. above £500 and not above £1000; and 3 per cent. on all estates above £1000 in value, there being no duty chargeable on estates not above £100, and the rate being levied on estates not above £1000 on even fifties, and above £1000 on even hundreds, any fraction of these sums being reckoned as a complete fifty or hundred respectively (§ 27). And (4) in respect of any legacy, residue, share of residue, or succession payable out of estate upon which these duties have been paid, the further duty of 1 per cent. formerly chargeable against ascendants and descendants in

<sup>1</sup> 43 Vict. c. 14, Appendix XVI.

<sup>2</sup> 44 Vict. c. 12, Appendix XVII.

the direct line was declared to be no longer payable (§ 41), —estate contained in additional inventories on which the duty was payable at former rates, and foreign personal estate on which no inventory duty was payable, and heritable property forming part of a succession, still remaining subject to the 1 per cent. duty.

The new duties were imposed (in lieu of those formerly payable) on all inventories recorded on and after 1st June 1881, except on additional inventories where the original inventory had been recorded before that date. In such cases the duty on the additional inventory continued to be regulated by the Statutes in force previous to the passing of the Act of 1881. The duties imposed by the Act of 1808 were entirely superseded by those imposed by the Act of 1815, but the latter Act was amended in 1816 to the effect that additional inventories should be exempt from its operation where the original inventory had been given up prior to 1st September 1815, and that such additional inventories should still be subject to the duties imposed by the Act of 1808.<sup>1</sup> And the Act of 1880 provided that where a former stamped inventory had been recorded prior to 1st April 1880 any additional inventory should be chargeable with the same duty as if that Act had not been passed. The result therefore was that where the original inventory had been given up at any time down to 31st August 1815, the amount of duty is regulated by the Act of 1808;<sup>2</sup> between 31st August 1815 and 1st April 1880 by the Act of 1815;<sup>3</sup> and on or after 1st April 1880 and before 1st June 1881, by the Act of 1880.<sup>4</sup> When the original inventory has been given up on or after 1st June 1881 and the deceased has died before 2nd August 1894, the duty on any additional inventory will be regulated by the Act of 1881.

Under the Act of 1808 (§ 40) every additional inventory

<sup>1</sup> 56 Geo. III. c. 107.

<sup>2</sup> 48 Geo. III. c. 149, Appendix III.

<sup>3</sup> 55 Geo. III. c. 184, Appendix IV.

<sup>4</sup> 43 Vict. c. 14, Appendix XVI.

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—

had to be stamped with the amount of duty payable in respect of the whole estate, and application made for return of the original inventory with the duty impressed thereon as a spoiled stamp. But by an Act passed in 1813 an additional inventory was exempted from all stamp duty where the amount of the estate given up did not involve the payment of any higher duty than had been paid on the original inventory,<sup>1</sup> and this exemption was repeated in the Act of 1815. And in 1853 it was enacted that every additional inventory should be chargeable only with such an amount of stamp duty as, together with the stamp duty paid on any former inventory, should make up the full amount of duty exigible on the whole estate given up.<sup>2</sup>

Temporary  
estate  
duty.

By the Customs and Inland Revenue Act 1889,<sup>3</sup> where the value of the estate upon which inventory duty is payable, contained in any inventory exhibited on or after 1st June 1889, should exceed £10,000, a duty called Estate Duty was also exigible on such estate, in addition to the inventory duty, at the rate of £1 on every £100 or fraction thereof. This duty was not impressed upon the inventory, but on a statement (printed forms of which were supplied by the Inland Revenue) which the person exhibiting the inventory was bound to deliver along with it, to be transmitted therewith to the Stamp Office. The duty was not chargeable on estate contained in any additional inventory where the original inventory was exhibited before 1st June 1889. But where the original inventory had been exhibited on or after that date, and where estate duty had been paid, an additional statement had to be given up with any additional inventory, impressed with a stamp corresponding to the additional value of the estate given up; where no estate duty had previously been paid, and it appeared from the additional inventory that the value of the whole estate exceeded £10,000, estate duty on the total value became exigible, and a state-

<sup>1</sup> 53 Geo. III. c. 108, § 19.<sup>3</sup> 52 Vict. c. 7, § 5, Appendix XVIII.<sup>2</sup> 16 and 17 Vict. c. 59, § 8.

ment stamped accordingly had to be delivered with the additional inventory. It was provided that this estate duty should not be payable in respect of the value of the estate and effects of any person dying on or after 1st June 1896 (§ 7); but by the Finance Act 1894, § 1, Sch. 1 (4), it ceased to be chargeable in respect of property chargeable with the new estate duty under that Act. It is now exigible therefore only on the estates of persons who died before 2nd August 1894.

CHAPTER  
XIII.  
—  
Cessation  
of duty.

By the Act of 1808 and 1815 the inventory of the effects of any common seaman, marine, or soldier who should be slain or die in the service of the Crown was exempted from duty.<sup>1</sup> This exemption applied only to inventory duty and not to legacy duty, so that in the event of the estate exceeding £100 it would still be liable in the latter duty, and as the rate varies from 1 to 10 per cent. it might sometimes, where the whole estate is over £100 and not more than £300, be more advantageous for the executor to ignore the exemption and pay the thirty shillings duty, by which the liability for legacy duty would be obviated. The term "common seaman" does not include a warrant officer, as, for instance, a master-gunner, but includes an engine-room artificer, and the term "common soldier" is considered to apply to the ordinary rank and file, and therefore to include a corporal, but not a sergeant. Inventories *ad non executa*, in respect the estate contained in them must always have been given up in some previous inventory, require no stamp. An inventory for confirmation *ad omissa* or *male appretiata* will also be exempted from duty either if its contents have been included in some previous inventory on which duty has been paid, or if the value of any estate given up for the first time, when added to that on which duty has been already paid, does not involve the payment of higher duty.<sup>2</sup>

By § 8 (1) of the Finance Act 1894, it is provided that the existing exemption from duty of the property of common seamen, marines, and soldiers shall apply to estate duty.

<sup>1</sup> Schedule, Part III. of both Acts.

<sup>2</sup> Hanson's *Revenue Acts*, 193.

## CHAPTER XIV.

### FEES IN COMMISSARY PROCEEDINGS.

**CHAPTER XIV.** — THE fees chargeable on confirmations and other Commissary proceedings are now fixed by Part XI. of the Act of Sederunt, dated 20th December 1898, regulating the fees payable in the Sheriff Courts in Scotland. The Act came into operation on 1st January 1899. It is thereby, *inter alia*, enacted that each Sheriff (Commissary) Clerk shall be responsible for the collection of all fees specified in the tables, and that it shall be his duty to refuse to receive any paper chargeable with a fee, unless the appropriate fee has been paid.

### TABLE OF FEES.

#### PART XI.—CONFIRMATION OF EXECUTORS AND OTHER COMMISSARY PROCEEDINGS.

1. Petition for appointment of executor, including intimation, decree dative, and recording thereof, . . . £0 10 0
2. Petition for restriction of caution and for special warrant, including deliverance, . . . . . 0 5 0
3. Receiving and examining inventory and testamentary and other writings relative thereto (if any) ; preparing bond of caution (if any) ; expediting confirmation, including recording, certificates of registration, writing confirmation and inventory, sealing, correspondence, &c.—
  - (a.) Gross estate sworn not to exceed £500, under the Acts 38 and 39 Vict. c. 41, and 39 and 40 Vict. c. 24, and Acts amending the same, in whatever manner application may be made :—
 

When the amount of the estate which may be confirmed does not exceed £20, . . . . . 0 5 0

And 1s. for each £10 or part of £10 after the first £20, but the total fee is not to exceed 15s.

(b.) Gross estate not sworn not to exceed :—

When the amount of the estate which may be confirmed

- |  |         |
|--|---------|
| (1) Does not exceed £500, . . . . .  | £1 10 0 |
| (2) Exceeds £500 and does not exceed £1000, . . . . .  | 2 10 0  |
| (3) Exceeds £1000 and does not exceed £20,000 ; £2, 10s. for the first £1000, and 10s. for each £1000 or part of £1000 thereafter. |         |
| (4) Exceeds £20,000 and does not exceed £100,000 ; £12 for the first £20,000, and 10s. for each £5000 or part of £5000 thereafter. |         |
| (5) Exceeds £100,000 ; £20 for the first £100,000, and 10s. for each £10,000 or part of £10,000 thereafter.                        |         |

(c.) Additional and corrective inventories and eiks shall be charged at the above rates on the additional estate which may be confirmed.

(d.) Where it is declared that confirmation is not required, fees at half the *ad valorem* rate shall be charged on receiving the inventory. If confirmation should subsequently be required, the remaining half of the fees shall then be charged.

- |  |        |
|--|--------|
| 4. Writing extracts or copies from records, duplicate confirmations, &c., including certificates on certified copies and sealing when required, per sheet, . . . . . | 0 1 0  |
| 5. Searches, to include inspection, each case—   |        |
| Within five years from date of search, . . . . .   | 0 1 0  |
| Beyond do. do. do. . . . .   | 0 2 6  |
| 6. Commissary Clerk, Edinburgh—  |        |
| (a.) Certifying English or Irish probates or letters of administration, including entering abstracts, collating, sealing, and correspondence, . . . . .              | 0 15 0 |
| (b.) Sealing probates and letters of administration under the Colonial Probates Act 1892, in addition to the fees in section 3, (b.), (c.), (d.), . . . . .          | 0 15 0 |
| 7. Fee under Finance Act (section 23, sub-section 7) 1894, . . . . .   | 0 2 6  |
| 8. Contentious and other business not specially provided for. The same fees as for similar business in the ordinary Sheriff Court (Part XII.).                       |        |

## NOTE.

CHAPTER XIV. The following are the fees on confirmations under Article 3 of the foregoing table :—

(a.) Where the GROSS estate under the Small Estates Acts is SWORN NOT TO EXCEED £500, and the amount of the estate which may be confirmed does not exceed—

£20 . . . . .	Fee 5s.	£80 . . . . .	Fee 11s.
30 . . . . .	6s.	90 . . . . .	12s.
40 . . . . .	7s.	100 . . . . .	13s.
50 . . . . .	8s.	110 . . . . .	14s.
60 . . . . .	9s.	500 . . . . .	15s.
70 . . . . .	10s.		

(b.) Where the GROSS estate is NOT SWORN NOT TO EXCEED £500, and the amount of estate which may be confirmed does not exceed—

£500 . . . . .	Fee £1 10 0	£20,000 . . . . .	Fee £12 0 0
1,000 . . . . .	2 10 0	25,000 . . . . .	12 10 0
2,000 . . . . .	3 0 0	30,000 . . . . .	13 0 0
3,000 . . . . .	3 10 0	35,000 . . . . .	13 10 0
4,000 . . . . .	4 0 0	40,000 . . . . .	14 0 0
5,000 . . . . .	4 10 0	45,000 . . . . .	14 10 0
6,000 . . . . .	5 0 0	50,000 . . . . .	15 0 0
7,000 . . . . .	5 10 0	55,000 . . . . .	15 10 0
8,000 . . . . .	6 0 0	60,000 . . . . .	16 0 0
9,000 . . . . .	6 10 0	65,000 . . . . .	16 10 0
10,000 . . . . .	7 0 0	70,000 . . . . .	17 0 0
11,000 . . . . .	7 10 0	75,000 . . . . .	17 10 0
12,000 . . . . .	8 0 0	80,000 . . . . .	18 0 0
13,000 . . . . .	8 10 0	85,000 . . . . .	18 10 0
14,000 . . . . .	9 0 0	90,000 . . . . .	19 0 0
15,000 . . . . .	9 10 0	95,000 . . . . .	19 10 0
16,000 . . . . .	10 0 0	100,000 . . . . .	20 0 0
17,000 . . . . .	10 10 0	and thereafter	
18,000 . . . . .	11 0 0	foreach £10,000	
19,000 . . . . .	11 10 0	or part thereof . . . . .	0 10 0

## APPENDIX OF ACTS.



## APPENDIX OF ACTS.

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### I.—ACT ANENT THE CONFIRMATION OF TESTAMENTS— SCOTS ACTS, 1690, CAP. 26.

OUR SOVERAIGNE LORD AND LADY the King and Queens Majesties, and three Estates of Parliament, Considering the great vexatione occasioned to their Majesties leidges, by commissars and their clerkes fiscalls and officers, chargeing them to confirme the testaments of their deceast relations doe hereby discharge and forbid in all tyme comeing, all commissars and their fiscalls clerkes and officers, to charge pursue or require any persone to confirme the testament, or give up inventory of the goods of any other person defunct except at the instance of the relict bairnes, nearest of kin and their tutors and curators or of a creditor, Declareing all charges pursuites and executions otherwise made and given to be void and null : And farder their Majesties with consent foresaid, Declare that where speciall assignations and dispositions are lawfully made by the defunct, tho' neither intimate nor made publick in his lifetime they shall be yet good and valid rights and titles to possess bruike, enjoye, pursue or defend, albeit the soumes of money or goods therein contained be not confirmed without prejudice alwayes to the competitione of creditors and others, and of their rights and diligences as formerly before the making heirof.

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### II.—ACT ANENT EXECUTRY AND MOVEABLES— SCOTS ACTS, 1695, CAP. 41.

OUR SOVERAIGN LORD, Considering that the law is defective, as to the affecting with legal diligence the moveable estate which pertained to a defunct, either for his own or his nearest of kin's debt, in such manner as a defuncts heretage may be affected by charging to enter heir in the known

APPENDIX  
II.

manner, doth therefore with advice and consent of the Estates of Parliament Statute and Ordain that in the case of a moveable estate left by a defunct, and falling to his nearest of kin, who lyes out, and doth not confirm the creditors of the said nearest of kin, may either require the Procurator-fiscal to confirm and assign to them under the perril and pain of his being lyable for the debt, if he refuse, or they may obtain themselves decerned executors-dative to the defunct as if they were creditors to him : With this provision allways, that the creditors of the defunct, doing diligence to affect the said moveable estate within year and day of their debtor's deceas, shall alwayes be preferred to the diligence of the said nearest of kin. And it is further declared that in the case of any depending cause or clame against a defunct at the time of his deceas it shall be liesom to the persuer of the said cause or clame to charge the defunct's nearest of kin to confirm executor to him within twenty dayes after the charge given, which charge so execute shall be a passive title against the person charged as if he were a vitious intro-metter, unless he renunce and then the charger may proceed to have his debt constitut, and the haereditas jacens of moveables declared lyable by a decret cognitionis causae, upon the obtaining whereof, he may be decerned executor-dative to the defunct and so affect his moveables in the common form.

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III.—REVENUE ACT 1808—48 GEORGE III. CAP. 149,  
SECTIONS 38 TO 42 INCLUSIVE.

Executors  
and others  
intromitting  
with the  
effects in  
Scotland of  
any person  
dying after  
the 10th  
October 1808  
to exhibit  
an inventory  
thereof in  
the Com-  
missary  
Court there,  
duly  
stamped ;

38. And be it further enacted, That all and every person or persons, who as executor or executors, nearest in kin, creditor or creditors, or otherwise, shall intromit with or enter upon the possession or management of any personal or moveable estate or effects in Scotland, of any person dying after the tenth day of October one thousand eight hundred and eight shall on or before disposing of or distributing any part of such estate or effects, or uplifting any debt due to the deceased, and at all events within six calendar months next after having assumed such possession or management, in whole or in part, and before any such person or persons shall be confirmed executor or executors, testamentary or dative, exhibit upon oath or solemn affirmation in the proper Commissary Court in Scotland (which oath or affirmation any judge of or a commissioner appointed by such Court is hereby authorised to administer, and which oath or affirmation shall not be chargeable with any stamp duty), a full and true inventory duly stamped as required by this Act, of all the personal or moveable estate and effects of the deceased already recovered or known to be existing, distinguishing what shall be situated in Scotland and what elsewhere, together with any testament or other writing relating to the disposal of such estate and effects, or any part thereof, which the person or persons exhibiting such inventory shall have in his, her, or their custody or power ; which said inventory, together with such testament or other writing (if any such there be) shall be

recorded in the books of the said Court without any other expense to the party than the ordinary fees of registration; and if at any subsequent period a discovery shall be made of any other effects belonging to the deceased, an additional inventory or additional inventories of the same shall, within two calendar months after the discovery thereof, be in like manner exhibited upon oath or solemn affirmation, by any person or persons, intromitting with or assuming the management of such effects, which additional inventory or inventories shall also be recorded in the manner aforesaid; and in case any person or persons, hereby required to exhibit any such inventory or inventories as aforesaid, shall refuse or neglect so to do, within the time prescribed for that purpose, or shall knowingly omit any part of the estate or effects of the deceased therein, he, she, or they shall, for every such offence, forfeit the sum of twenty pounds to be recovered by ordinary action or summary complaint in the Sheriff, Stewart, or Borough Court, or before any justice of the peace of the shire, stewartry, or borough where the person or persons sued or complained of shall reside; which court or justice shall have power, if there shall appear cause, to mitigate such penalty, so that the same be not reduced below one moiety thereof besides costs of suit; and, the person or persons so offending shall also be charged and chargeable with, and be holden liable to the payment of double the amount of the stamp duty which would have been payable upon such inventory or inventories so neglected to be exhibited, according to the amount or value of the estate and effects, which ought to have been specified therein, or double the amount of the further or increased stamp duty which would have been payable upon any such inventory or inventories exhibited, in respect of the estate or effects so omitted therein as aforesaid, as the case may require; which double duty shall be deemed and taken to be a debt to his Majesty, his heirs and successors, of the person or persons liable to pay the same, and shall and may be sued for and recovered accordingly.

APPENDIX  
III.

and an additional inventory on discovering other effects.

Penalty of neglect.

39. And be it further enacted, That all and every the inventory and inventories, so to be exhibited and recorded as aforesaid, shall be retained by the Clerk of the Commissary Court wherein the same shall be exhibited, and shall be transmitted by him from time to time, as often as required, together with the said oath or affirmation relating thereto, to the Solicitor of Stamp Duties at Edinburgh, who shall file and preserve the same in the Stamp Office there; and if the clerk of any such Court shall fail to record, retain, or transmit any such inventory, which shall be exhibited there to be recorded as aforesaid, or shall receive or record any such inventory which shall not be duly stamped as the law requires, he shall, for every such offence, forfeit the sum of fifty pounds.

Such inventories being recorded, to be transmitted to the Solicitor of Stamps at Edinburgh.

40. And be it further enacted, That where any such additional inventory shall be exhibited to be recorded as aforesaid, the same shall also specify the amount or value of the estate and effects of the same person, comprised in any former inventory or inventories; and the stamp duty to be charged on such additional inventory shall be the *ad valorem* duty payable in respect of the total amount or value of the estate and effects specified

Additional inventories to specify the amount of the effects in former inventories; and the stamp-duty

APPENDIX  
III.

to be according to the total of both ; and the duty on the former to be repaid.

therein, and in any such former inventory or inventories ; and upon any such additional inventory, duly stamped, being recorded and transmitted as aforesaid, the Solicitor of Stamp Duties shall, upon the application of the party who shall have exhibited the same, deliver out to such party the former inventory, with a certificate thereon signed by him, bearing that an additional inventory of the effects of the deceased duly stamped, had been transmitted to him and filed as aforesaid ; and such certificate shall entitle the party exhibiting the additional inventory to demand and receive the amount of the stamp duty on such former inventory from the head distributor of stamps at Edinburgh, who shall pay the same out of any monies in his hands, arising from the duties hereby charged on such inventories as aforesaid on a proper receipt being given for the same, and upon the former inventory and certificate being delivered to him, to be produced with the receipt, as a voucher for such payment.

The duty on any inventory to be charged only in respect of effects in Scotland.

Confirmations of testaments not to be granted for effects not included in such inventory. Executors not to recover effects unless so included.

41. Provided always, and be it further enacted, That the duty charged in the schedule hereunto annexed upon any such inventory to be exhibited as aforesaid, shall be deemed and taken to be charged and payable only in respect of the amount or value of such parts of the estate and effects therein mentioned as shall be situated in Scotland.

42. And be it further enacted, That it shall not be lawful for any Commissary Court in Scotland to grant confirmation of any testament, testamentary or dative, or eik thereto, of or for any estate or effects whatever, of any person dying after the tenth day of October one thousand eight hundred and eight, unless the same shall be mentioned and included in some such inventory exhibited and recorded as aforesaid ; and it shall not be competent to any executor or executors, or other person or persons to recover any debt or other effects in Scotland of or belonging to any person dying after the said tenth day of October, unless the same shall have been previously included in some such inventory exhibited and recorded as aforesaid ; except the same respectively were vested in the deceased, as a trustee for any other person or persons, and not beneficially ; but these provisions are not in other respects to prejudice the law of Scotland regarding total or partial confirmations or the rules of succession there established.

(Superseded except as regards additional inventories. See p. 261.)

SCHEDULE ; PART THE THIRD—Containing (*inter alia*) the Duties on Confirmations of Testaments testamentary and dative, and on Inventories to be exhibited in the Commissary Courts in Scotland.

CONFIRMATION of any Testament, testamentary or dative, or eik thereto, to be expedite in any Commissary Court in Scotland after the 10th day of October 1808, where the deceased shall have died before or upon that day, and subsequent to the 10th day of October 1804.

INVENTORY to be exhibited and recorded in any Commissary Court in Scotland of the estate and effects of any person deceased who shall have died after the 10th day of October 1808.

Where the Estate and Effects for or in respect of which such Confirmation or Eik shall be granted or expedie, or whereof such Inventory shall be exhibited and recorded, shall be,—				DUTY
Above the value of £20 and under the value of £100.....				10s.
Of the value of.....100	...	200.....	£2	
... 200	...	300.....	5	
... 300	...	450.....	8	
... 450	...	600.....	11	
... 600	...	800.....	15	
... 800	...	1,000.....	22	
... 1,000	...	1,500.....	30	
... 1,500	...	2,000.....	40	
... 2,000	...	3,500.....	50	
... 3,500	...	5,000.....	60	
... 5,000	...	7,500.....	75	
... 7,500	...	10,000.....	90	
... 10,000	...	12,500.....	110	
... 12,500	...	15,000.....	135	
... 15,000	...	17,500.....	160	
... 17,500	...	20,000.....	185	
... 20,000	...	25,000.....	210	
... 25,000	...	30,000.....	260	
... 30,000	...	35,000.....	310	
... 35,000	...	40,000.....	360	
... 40,000	...	45,000.....	410	
... 45,000	...	50,000.....	460	
... 50,000	...	60,000.....	550	
... 60,000	...	70,000.....	650	
... 70,000	...	80,000.....	750	
... 80,000	...	90,000.....	850	
... 90,000	...	100,000.....	950	
... 100,000	...	125,000.....	1200	
... 125,000	...	150,000.....	1400	
... 150,000	...	175,000.....	1600	
... 175,000	...	200,000.....	2000	
... 200,000	...	250,000.....	2500	
... 250,000	...	300,000.....	3000	
... 300,000	...	350,000.....	3500	
... 350,000	...	400,000.....	4000	
... 400,000	...	500,000.....	5000	
... 500,000, or upwards,.....			6000	

## IV.—REVENUE ACT 1815,—55 GEORGE III. CAP. 184.

(By Sections 1 and 2 the duties granted by the Act of 1808 were repealed and the following substituted from and after the 31st August 1815.)

(Superseded  
except as  
regards  
additional  
inventories.  
See p. 251.)

**SCHEDULE PART THE THIRD**—Containing (*inter alia*) the Duties on Confirmations of Testaments, testamentary and dative, and on Inventories to be exhibited in the Commissary Courts of Scotland.

**CONFIRMATION** of any Testament-testamentary or eik thereto, or of any Testament-dative, to be expedite in any Commissary Court in Scotland where the deceased shall have died before or upon the 10th day of October 1808, and subsequent to the 10th day of October 1804.\*

**INVENTORY** to be exhibited and recorded in any Commissary Court in Scotland of the estate and effects of any person deceased who shall have died after the 10th day of October 1808.

				DUTY	
Where the estate and effects for or in respect of which such Confirmation or Eik respectively shall be granted or expedite, or whereof such Inventory shall be exhibited and recorded, shall be—				Testate.	Intestate.
Above the value of £20 and under £50				10s.	10s.
Of the value of 50 ... 100				10s.	£1
... 100 ... 200				£2	3
... 200 ... 300				5	8
... 300 ... 450				8	11
... 450 ... 600				11	15
... 600 ... 800				15	22
... 800 ... 1,000				22	30
... 1,000 ... 1,500				30	45
... 1,500 ... 2,000				40	60
... 2,000 ... 3,000				50	75
... 3,000 ... 4,000				60	90
... 4,000 ... 5,000				80	120
... 5,000 ... 6,000				100	150
... 6,000 ... 7,000				120	180
... 7,000 ... 8,000				140	210
... 8,000 ... 9,000				160	240
... 9,000 ... 10,000				180	270
... 10,000 ... 12,000				200	300
... 12,000 ... 14,000				220	330
... 14,000 ... 16,000				250	375
... 16,000 ... 18,000				280	420
... 18,000 ... 20,000				310	465
... 20,000 ... 25,000				350	525

\* It appears to have been assumed that a Testament-dative could never be issued except the deceased had died intestate; and accordingly all Testaments-dative are by the Schedule subjected to intestate duty.

				Duty		APPENDIX IV.
				Testate.	Intestate.	
Of the value of £25,000 and under £30,000				£400	£800	
...	30,000	...	35,000	450	675	
...	35,000	...	40,000	525	785	
...	40,000	...	45,000	600	900	
...	45,000	...	50,000	675	1,010	
...	50,000	...	60,000	750	1,125	
...	60,000	...	70,000	900	1,350	
...	70,000	...	80,000	1,050	1,575	
...	80,000	...	90,000	1,200	1,800	
...	90,000	...	100,000	1,350	2,025	
...	100,000	...	120,000	1,500	2,250	
...	120,000	...	140,000	1,800	2,700	
...	140,000	...	160,000	2,100	3,150	
...	160,000	...	180,000	2,400	3,600	
...	180,000	...	200,000	2,700	4,050	
...	200,000	...	250,000	3,000	4,500	
...	250,000	...	300,000	3,750	5,625	
...	300,000	...	350,000	4,500	6,750	
...	350,000	...	400,000	5,250	7,875	
...	400,000	...	500,000	6,000	9,000	
...	500,000	...	600,000	7,500	11,250	
...	600,000	...	700,000	9,000	13,500	
...	700,000	...	800,000	10,500	15,750	
...	800,000	...	900,000	12,000	18,000	
...	900,000	...	1,000,000	13,500	20,250	
...	1,000,000 and upwards,			15,000	22,500	

NOTE.—By 22 and 23 Vict. cap. 36 (13th Aug. 1859), § 1, for every £100,000 and fractional part of £100,000 above £1,000,000 there was imposed, if testate, £1500; if intestate, £2250. By 27 and 28 Vict. cap. 56, § 5, inventories of persons dying after 25th July 1864, where the whole estate did not exceed £100 in value, were exempted from duty.

#### V.—AN ACT FOR THE BETTER GRANTING OF CONFIRMATIONS IN SCOTLAND,—4 GEO. IV. CAP. 98, 19TH JULY 1823.

WHEREAS it is expedient that provision should be made for the better granting of confirmations, in certain cases, in Scotland; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the passing of this Act, in all cases of intestate succession, where any

Right to  
confirmation  
to transmit  
to represen-  
tatives.

APPENDIX  
V.

person or persons who, at the period of the death of the intestate, being next of kin, shall die before confirmation be expedite, the right of such next of kin shall transmit to his or her representatives, so that confirmation may and shall be granted to such representatives, in the same manner as confirmations might have been granted to such next of kin immediately upon the death of such intestate.

Court to regulate caution to be found.

2. And be it further enacted, That from and after the first day of January one thousand eight hundred and twenty-four caution shall not be required to be found by executors-nominate; and in all other cases the Court granting confirmation shall fix the amount of the sum for which caution shall be found by the person or persons to whom confirmation shall be granted, not exceeding the amount confirmed.

Partial confirmations to cease.

3. And be it further enacted, That from and after the first day of January one thousand eight hundred and twenty-four, every person requiring confirmation shall confirm the whole moveable estate of a deceased person known at the time, to which such person shall make oath: Provided always that it shall and may be lawful to eik to such confirmation any part of such estate that may afterwards be discovered, provided the whole of such estate so discovered shall be added upon oath as aforesaid: Provided, nevertheless, that nothing herein contained shall affect or alter the provision made with respect to special assignations by an Act of the Scottish Parliament made in the year one thousand six hundred and ninety, entitled *Act anent the Confirmation of Testaments*.

In case of executors-creditor confirmation to be granted.

4. Provided further, and be it enacted, That in the case of confirmation by executors-creditor, such confirmation may be limited to the amount of the debt and sum confirmed, to which such creditor shall make oath: Provided always, that notice of every application for confirmation by any executors-creditor shall be inserted in the *Edinburgh Gazette*, at least once, immediately after such application shall be made; in evidence whereof, a copy of the *Gazette* in which such notice shall have been inserted shall be produced in Court before any such confirmation shall be further proceeded in.

## VI.—INSTRUCTIONS BY COMMISSARIES OF EDINBURGH, 31ST DECEMBER 1823.

*Commissaries*—Gordon, Tod, Fergusson, and Ross.

INSTRUCTIONS to the Commissary Clerks of Edinburgh as to confirmations to be expedite subsequent to the 1st of January 1824.

1. With a view to the proper fulfilment of the 3rd section of the Act 4th George IV., cap. 98, you will take care that in every case, when there is given up to be recorded either an original or an additional inventory, it contains the defunct's whole moveable means and estate so far as then come

to the deponent's knowledge, and further, that the deponent either then requires or does not require (as the case may be) a confirmation to be immediately expedite. A form of the oath with the alterations referred to in general terms is subjoined; of course, however, such variations as circumstances render necessary will be made, consistently with the substance and object of the oath.

2. Where the oath bears that confirmation is immediately required, and such confirmation is accordingly expedite, no other oath is conceived to be necessary to comply with the terms of this clause of the Act. But where the oath bears that no confirmation is at the time required, then none shall thereafter be expedite (however short the interval may be) without a special oath or affidavit from the party, in which he shall, in terms of the Act of Parliament, depone to all additional articles that have been discovered since the date of the former oath, or, if there are none such, he shall make oath that since the date of giving up the original or additional inventory, no other debts, goods, or effects have come to his knowledge, and that the inventory thereof already given up contains the whole moveable estate of the defunct, so far as known at the date of taking this last oath. Such special oaths or affidavits on account of their reference to the inventory previously given up, you will enter in the ordinary Record of Inventories (for the ordinary expense of registration), and periodically transmit the same to the Stamp Office along with the other inventories and oaths relative to personal estates, a separate entry of all such special oaths being made in the responde book of inventories.

3. With reference to the last clause of the Act, as to confirmations by executors-creditors, such confirmations may (if required) comprehend no more of the inventory recorded than a sum equal in amount to the debt due and the expense of confirmation; in other words, it may be a confirmation to any extent the executor desires. And in the oath upon the inventory given in to be recorded, such executors shall depone to the verity of the debt on which they may have been decerned in terms of what appears to be the meaning of this part of the Act.

4. Where an executor-dative intends to avail himself of the second clause in the Act, which empowers the Court to fix the amount of caution, such executor must present a written application, stating shortly the extent of the inventory to be confirmed, the amount to which he is desirous the caution should be limited, and the grounds on which his demand is founded, which application the Court will dispose of in a summary manner, with a due regard to the circumstances of the case.

5. You will continue the Record of Testaments and Decrees as formerly.

(Signed) JAMES GORDON.

Consistorial Court of Edinburgh,  
31st December 1823.

(NOTE.—The form of oath appended to the foregoing Instructions, and referred to in section 1 is superseded by that now in use [FORM 63].)

VII.—INTESTATE MOVEABLE SUCCESSION SCOTLAND  
ACT, 1855,—18 VICT. CAP. 23.

*An Act to alter in certain respects the law of Intestate Moveable  
Succession in Scotland (25th May 1855).*

The issue of a predeceasing next of kin shall come in the place of their parent in the succession to an intestate.

1. In all cases of intestate moveable succession in Scotland accruing after the passing of this act, where any person who, had he survived the intestate, would have been among his next of kin, shall have predeceased such intestate, the lawful child or children of such person, so predeceased shall come in the place of such person, and the issue of any such child or children, or of any descendant of such child or children who may in like manner have predeceased the intestate, shall come in the place of his or their parent predeceasing, and shall respectively have right to the share of the moveable estate of the intestate to which the parent of such child or children or of such issue, if he had survived the intestate, would have been entitled: provided always, that no representation shall be admitted among collaterals after brothers' and sisters' descendants, and that the surviving next of kin of the intestate claiming the office of executor shall have exclusive right thereto, in preference to the children or other descendants of any predeceasing next of kin, but that such children or descendants shall be entitled to confirmation when no next of kin shall compete for said office.

Issue of predeceasing heir succeeding to the intestate's heritage may collate, but other issue not excluded by his not collating from claiming out of moveable estate difference between value of heritage and share their parent would have taken on collation.

2. Where the person predeceasing would have been the heir in heritage of an intestate leaving heritable as well as moveable estate had he survived such intestate, his child being the heir in heritage of such intestate, shall be entitled to collate the heritage to the effect of claiming for himself alone, if there be no other issue of the predeceaser, or for himself and the other issue of the predeceaser, if there be such other issue, the share of the moveable estate of the intestate which might have been claimed by the predeceaser upon collation if he had survived the intestate; and daughters of the predeceaser, being heirs-portioners of the intestate, shall be entitled to collate to the like effect; and where, in the case aforesaid, the heir shall not collate, his brothers and sisters, and their descendants in their place, shall have right to a share of the moveable estate equal in amount to the excess in value over the value of the heritage of such share of the whole estate, heritable and moveable, as their predeceasing parent, had he survived the intestate, would have taken on collation.

Father to succeed to extent of one-half when no issue.

3. Where any person dying intestate shall predecease his father without leaving issue, his father shall have right to one-half of his moveable estate, in preference to any brothers or sisters or their descendants who may have survived such intestate.

Where father has predeceased, mother to succeed to extent of one-third. Succession by brothers and sisters uterine.

4. Where an intestate dying without leaving issue, whose father has predeceased him shall be survived by his mother, she shall have right to one third of his moveable estate, in preference to his brothers and sisters or their descendants, or other next of kin of such intestate.

5. Where an intestate dying without leaving issue, whose father and mother have both predeceased him, shall not leave any brother or sister

german or consanguinean, nor any descendant of a brother or sister german or consanguinean, but shall leave brothers and sisters uterine, or a brother or sister uterine, or any descendant of a brother or sister uterine, such brothers and sisters uterine and such descendants in place of their predeceasing parent shall have right to one-half of his moveable estate.

6. Where a wife shall predecease her husband, the next of kin, executors, or other representatives of such wife, whether testate or intestate, shall have no right to any share of the goods in communion, nor shall any legacy or bequest or testamentary disposition thereof by such wife affect or attach to the said goods or any portion thereof.

7. Where a marriage shall be dissolved before the lapse of a year and day from its date, by the death of one of the spouses, the whole rights of the survivor and of the representatives of the predeceaser shall be the same as if the marriage had subsisted for the period aforesaid.

8. So much of an act of the Parliament of Scotland passed in the year one thousand six hundred and seventeen, and intituled *Anent Executors*, as allows executors-nominate to retain to their own use a third of the dead's part in accounting for the moveable estate of the deceased, is hereby repealed, and executors-nominate shall, as such, have no right to any part of the said estate.

9. The words "intestate succession" shall mean and include succession in cases of partial as well as of total intestacy; "intestate" shall mean and include every person deceased who has left undisposed of by will the whole or any portion of the moveable estate on which he might, if not subject to incapacity, have tested; "moveable estate" shall mean and include the whole free moveable estate on which the deceased, if not subject to incapacity, might have tested, undisposed of by will, and any portion thereof so undisposed of.

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On a wife predeceasing her husband her representatives to have no claim on the goods in communion.

Not to affect rights of spouses on dissolution of marriage in certain cases.

Part of Act of Parliament of Scotland 1617, c. 14, repealed.

Interpretation of terms.

## VIII.—CONFIRMATION AND PROBATE ACT, 1858, 21 AND 22 VICT. CAP. 56.

*An Act to amend the Law relating to the Confirmation of Executors in Scotland, and to extend over all parts of the United Kingdom the effect of such Confirmation, and of Grants of Probate and Administration.—*  
[23rd July 1858.]

1. From and after the 12th day of November 1858, the practice of raising edicts of executry before the Commissary Courts in Scotland, for the decerniture of executors to deceased persons, shall cease, and it shall not be competent to any person to obtain himself decerned executor in virtue of any such edict raised subsequently to the date aforesaid.

Practice of raising edicts of executry to cease.

2. From and after the date aforesaid every person desirous of being decerned executor of a deceased person as dispoonee, next of kin, creditor, or in any other character whatsoever now competent, or of having some other

Petition to commissary to be substituted.

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VIII.Form of  
petition as  
in Schedule  
(A).

person, possessed of such character, decerned executor to a deceased person, shall, instead of applying, as heretofore, for an edict of executry from the commissary, present a petition to the commissary for the appointment of an executor, which petition shall be in the form as nearly as may be of the Schedule (A) hereunto annexed, and shall be subscribed by the petitioner or by his agent.

To whom  
petition to  
be presented.

3. Such petition shall be presented to the commissary of the county wherein the deceased died domiciled, and in the case of persons dying domiciled furth of Scotland, or without any fixed or known domicile, having personal or moveable property in Scotland, to the commissary of Edinburgh.

Mode of inti-  
mating peti-  
tion.

4. Every such petition, in place of being published at the kirk-door and market-cross, as edicts of executry have been in use to be published, shall be intimated by the commissary clerk affixing on the door of the commissary court house, or in some conspicuous place of the court and of the office of the commissary clerk, in such manner as the commissary may direct, a full copy of the petition, and by the keeper of the record of edictal citations at Edinburgh inserting in a book, to be kept by him for that purpose, the names and designations of the petitioner and of the deceased person, the place and date of his death, and the character in which the petitioner seeks to be decerned executor, which particulars the keeper of the record of edictal citations shall cause to be printed and published weekly, along with the abstracts of the petitions for general and special services, in the form of Schedule (B) hereunto annexed: Provided always, that to enable the keeper of the record of edictal citations to make such publication, the commissary clerk shall transmit to him the said particulars, and to enable the commissary clerk to grant the certificate after mentioned, the keeper of the record of edictal citations shall transmit to the commissary clerk a copy certified by the said keeper, of the printed and published particulars, all in such form and manner and on payment of such fees as the Court of Session by act of sederunt may direct.

Certificate of  
intimation of  
petition—  
Additional  
intimation of  
petition in  
certain  
cases.  
(Amended  
39 and 40  
Vic. c. 70,  
§ 44.)

5. The commissary clerk, after receiving the certified copy of the printed and published particulars, shall forthwith certify on the petition that the same has been intimated and published, in terms of the provisions of this Act, in the form of Schedule (C) hereunto annexed, and such certificate shall be sufficient evidence of the facts therein set forth: Provided always, that where a second petition for confirmation is presented in reference to the same personal estate, the commissary shall direct intimation of such petition to be made to the party who presented the first petition.

Procedure on  
petition.

6. On the expiration of nine days after the commissary clerk shall have certified the intimation and publication of a petition for the appointment of an executor as aforesaid, the same may be called in court, and an executor decerned, or other procedure may take place according to the forms now in use in case of edicts of executry, and with the like force and effect; and decree-dative may be extracted on the expiration of three lawful days after it has been pronounced, but not sooner: Provided always, that nothing herein contained shall alter or affect the law as to executors

Decree-  
dative.Proviso as to  
caution.

- finding caution ; and that bonds of caution for executors may be partly printed and partly written.
7. Provided always, that nothing hereinbefore contained shall alter or affect the course of procedure now in use before the commissaries in confirmations of executors-nominate. APPENDIX VIII.  
Not to affect present procedure.
8. Inventories of personal estates of deceased persons and relative testamentary writings may be given up and recorded in, and confirmations may be granted and issued by, any commissary court to which it is competent to apply in virtue of the provisions of this act for the appointment of an executor-dative to the deceased. Where inventories, etc., may be recorded. Confirmations may be granted.
9. From and after the date aforesaid it shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland any personal estate or effects of the deceased situated in England, or in Ireland, or both : Provided that the person applying for confirmation shall satisfy the commissary, and that the commissary shall by his interlocutor find that the deceased died domiciled in Scotland, which interlocutor shall be conclusive evidence of the fact of domicile : Provided also, that the value of such personal estate and effects situated in England or Ireland respectively shall be separately stated in such inventory, and such inventory shall be impressed with a stamp corresponding to the entire value of the estate and effects included therein, wheresoever situated within the United Kingdom. Inventory may include personal estate in any part of United Kingdom.  
(Amended 39 and 40 Vict. c. 70, § 41.)
10. Confirmations shall be in the form, or as nearly as may be in the form, of Schedules (D) and (E) hereunto annexed ; and such confirmations shall have the same force and effect with the like writs framed in terms of the acts of sederunt passed on the 20th December 1823, and the 25th February 1824, or at present in use. Form and effect of confirmations.
11. Oaths and affirmations on inventories of personal estates given up to be recorded in any commissary court may be taken either before the commissary or his depute, or the commissary clerk or his depute, or before any commissioner appointed by the commissary, or before any magistrate or justice of the peace within the United Kingdom, or the colonies, or any British consul. Oaths, before whom to be taken.
12. From and after the date aforesaid, when any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England, shall be produced in the principal court of probate in England, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said court of probate. Confirmation produced in Probate Court of England, and sealed, to have the effect of probate or administration.
13. From and after the date aforesaid, where any confirmation of the executor of a person who shall so be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also Confirmation produced in Probate Court of

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Dublin, and sealed, to have the effect of probate or administration.

personal estate situated in Ireland, shall be produced in the Court of Probate in Dublin, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said court, and returned to the person producing the same, and shall thereafter have the like force and effect in Ireland as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate in Dublin.

Probate or letters of administration produced in commissary court and certified, to have effect of confirmation.

14. From and after the date aforesaid, when any probate or letters of administration to be granted by the Court of Probate in England to the executor or administrator of a person who shall be therein, or by any note or memorandum written thereon signed by the proper officer, stated to have died domiciled in England, or by the Court of Probate in Ireland to the executor or administrator of a person who shall in like manner be stated to have died domiciled in Ireland, shall be produced in the Commissary Court of the county of Edinburgh, and a copy thereof deposited with the commissary clerk of the said court; the commissary clerk shall endorse or write on the back or face of such grant a certificate in the form as near as may be of the Schedule (F) hereunto annexed; and such probate or letters of administration, being duly stamped, shall be of the like force and effect and have the same operation in Scotland as if a confirmation had been granted by the said Court.

For securing the stamp-duties, probates, etc., to be deemed granted for all the property in the United Kingdom.

15. In any of the aforesaid cases where the deceased person shall be stated in or upon the probate or letters of administration to have been domiciled in England or in Ireland, as the case may be, such probate or letters of administration shall, for the purpose of securing the payment of the full and proper stamp-duties, be deemed and considered to be granted for and in respect of the whole of the personal and moveable estate and effects of the deceased in the United Kingdom, within the meaning of the Act of Parliament passed in the fifty-fifth year of the reign of King George the Third, chapter 184, and of all other Acts of Parliament granting or relating to stamp-duties on probates and letters of administration in England and Ireland respectively; and the affidavit required by law to be made on applying for probate or letters of administration in England or Ireland as to the value of the estate and effects of the deceased; and also where the commissary shall in manner aforesaid find that the deceased was domiciled in Scotland, the inventory required by law to be exhibited and recorded in the proper commissary court in Scotland before obtaining confirmation, or intermitting with or entering upon the possession or management of the personal or moveable estate or effects of the deceased in Scotland, shall respectively extend to and include the whole of the personal and moveable estate of the deceased person in the United Kingdom, and the value thereof; and the stamp-duties for the time being chargeable on probates and letters of administration and on inventories respectively shall be chargeable upon any probate or letters of administration to be granted, and any inventory to be exhibited and recorded as aforesaid respectively, for and in respect of the whole of the personal and moveable estate and effects of the deceased

Inventory to include all such property.

in the United Kingdom, and the value thereof; and the said affidavit shall also separately specify the value of the said estate and effects in Scotland.

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16. For the purpose aforesaid, and also for granting relief where too high a stamp-duty shall have been paid on any such probate or letters of administration, or inventory, the provisions contained in sections 40, 41, 42, and 43 of the said Act passed in the fifty-fifth year of his Majesty King George the Third, relating to probates and letters of administration granted in England, and the like provisions in the Act passed in the fifty-sixth year of the said king, chapter 56, relating to probates and letters of administration granted in Ireland, and the provisions contained in the Act passed in the forty-eighth year of the said king, chapter 149, relating to inventories in Scotland, and also all other provisions contained in the said Acts respectively, or in any other Act or Acts relating to probates and letters of administration and inventories respectively, shall apply to the probates and letters of administration to which effect is given by this Act, and to the whole of the personal and moveable estate of the deceased for or in respect of which the same shall, in pursuance of this Act, be deemed to be granted, wheresoever situate in the United Kingdom; and also to the inventories in which the whole of the personal and moveable estate of the deceased, wheresoever situate in the United Kingdom, ought, in pursuance of this Act, to be included, in as full and ample a manner as if all such provisions were herein enacted in reference to such probates, letters of administration, and inventories respectively.

Provisions of former Acts to apply to the probates, letters of administration, and inventories mentioned in this Act.

17. Provided, that in any case where, on applying for probate or letters of administration, it shall be required to be stated as aforesaid that the deceased was domiciled in England or in Ireland, the affidavit so as aforesaid required by law shall specify the fact according to the deponent's belief, which shall be sufficient to authorise the same to be so stated in or upon the probate or letters of administration: Provided also, that any such statement, and the interlocutor of the commissary finding that the deceased was domiciled in Scotland, shall be evidence, and have effect for the purposes of this Act only.

Affidavit as to domicile to be made on applying for probate or administration.

18. It shall be competent to the Court of Session, and they are hereby authorised and required, from time to time, to pass such Acts of Sederunt as shall be necessary and proper for regulating in all respects the proceedings under this Act before the commissary of Edinburgh, and other commissaries in Scotland, and following out the purposes of this Act, and also the fees to be paid to agents before the said Courts, and to the commissary clerks and other officers of Court, and the expense of publication of petitions.

Acts of Sederunt to be passed for following out purposes of this Act.

19. All former Acts, and Acts of Sederunt made in virtue thereof, so far as inconsistent with the present Act, are hereby repealed; and this Act may be amended or repealed by any Act to be passed during the present session of Parliament, and may be cited as the "Confirmation and Probate Act, 1858."

Former Acts of Sederunt repealed if inconsistent with this Act.

20. The word "commissary" shall include commissary-depute, and the term "commissary-clerk" shall include commissary clerk-depute.

Interpretation of terms.

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## SCHEDULES TO WHICH THE FOREGOING ACT REFERS.

## SCHEDULE (A).

*Form of a Petition for appointment of an Executor to a deceased person.*

Unto the Honourable the Commissary of [*specify the county*], the petition of A. B. [*here name and design the petitioner*];

Humbly sheweth,—That the late C. D. [*here name and design the deceased person to whom an executor is sought to be appointed*] died at [*specify place*] on or about the [*specify date*], and had at the time of his death his ordinary or principal domicile in the county of [*specify county, or "furth of Scotland," or "without any fixed domicile," or "without any known domicile," as the case may be*].

That the petitioner is the only son and next of kin [*or state what other relationship, character, or title the petitioner has, giving him right to apply for the appointment of executor*].

May it therefore please your Lordship to decern the petitioner executor-dative qua next of kin to the said C. D. [*or state the other character in which the petitioner claims to be appointed executor*].

According to Justice, etc.,

[*Signed by the petitioner or his agent*].

## SCHEDULE (B).

*Roll of Petitions for the Appointment of Executors in Commissary Courts in Scotland.*

County.	Name and designation of petitioner.	Title of petitioner.	Name and designation of defunct.	Place and date of death.
Edinburgh.	A. B., writer in Edinburgh.	Next of kin.	C. D., merchant, Edinburgh.	No. George Street, Edinburgh, 1st January, 1857.

## SCHEDULE (C).

*Form of Certificate by Commissary Clerk of publication of a Petition for the appointment of an Executor.*

(Repealed by  
39 and 40  
Vict. c. 70,  
§ 44.)

I, A. B., commissary clerk [*or commissary clerk depute, as the case may be*] of the county of [*specify county*], hereby certify that this petition was intimated by affixing a copy thereof on the door of the court-house [*if some other place has been directed by the commissary, specify it*], on the [*specify date*], and by being published by the keeper of the record of edictal citations at Edinburgh, in the printed roll of petitions for the

appointment of executors in the commissary courts of Scotland, printed and published on [specify date].

A. B.

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#### SCHEDULE (D).

*Form of a Testament Dative or Confirmation of the Executor of a person who has died without naming one.*

I, A. B., commissary of the county of [specify county], considering that by my decree, dated [specify date], I decerned C. D. executor-dative *qua* next of kin [or other character, as the case may be], of the late E. F., who died at [specify place], on [specify date], and seeing that the said C. D. has since given up on oath an inventory of the personal estate and effects of the said E. F., at the time of his death situated in Scotland [or situated in Scotland and England, or in Scotland and Ireland, or in Scotland, England, and Ireland, as the case may be], amounting in value to                pounds, which inventory has been recorded in my court-books, of date [specify date], and that he has likewise found caution for his acts and intromissions as executor: Therefore I, in Her Majesty's name and authority, make, constitute, ordain, and confirm the said C. D. executor-dative *qua* [specify character] to the defunct with full power to him to uplift, receive, administer, and dispose of the said personal estate and effects, and grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of executor-dative *qua* [specify character] is known to belong; providing always, that he shall render just count and reckoning for his intromissions therewith when and where the same shall be legally required.

Given under the seal of office of the commissariat [specify county], and signed by the clerk of court at [specify place], the [specify date].

*To be signed by the commissary clerk or his depute, and sealed with the seal of office.*

#### SCHEDULE (E).

*Form of a Testament Testamentar or Confirmation of an Executor Nominate.*

I, A. B., commissary of the county of [specify county], considering that the late C. D. died at [specify place], upon [specify date], and that by his last will [or other writing containing the nomination of executor], dated [specify date], and recorded in my court-books upon [specify date], the said C. D. nominated and appointed E. F. to be his executor, and that the said E. F. has given up on oath an inventory of the personal estate and effects of the said C. D., at the time of his death situated in Scotland [or situated in Scotland and England, or situated in Scotland and Ireland, or situated in Scotland, England, and Ireland, as the case may be], amounting in value to                pounds, which inventory has likewise been recorded in my court books of date [specify date]: Therefore I, in Her Majesty's name and authority, ratify, approve, and confirm the nomination of executor contained

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in the foresaid last will [*or other writing containing the nomination of executor*]; and I give and commit to the said E. F. full power to uplift, receive, administer, and dispose of the said personal estate and effects, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of an executor-nominate is known to belong: Providing always, that he shall render just count and reckoning for his intromissions therewith when and where the same shall be legally required.

Given under the seal of office of the commissariot of [*specify county*], and signed by the clerk of court at [*specify place*], the [*specify date*].

*To be signed by the commissary clerk or his depute, and sealed with the seal of office.*

## SCHEDULE (F).

I, A. B., commissary clerk [*or commissary clerk-depute*] of the county of Edinburgh, hereby certify that this grant of probate has [*or these letters of administration have*] been produced in the commissary court of the said county, and that a copy thereof has been deposited with me.

IX.—ACT OF SEDERUNT TO REGULATE PROCEEDINGS BEFORE COMMISSARIES, AND THE FEES OF CLERKS OF COMMISSARY COURTS (under the Act of Parliament 21 and 22 Vict. c. 56). (SO FAR AS STILL IN FORCE.)

EDINBURGH, 19th March 1859.

## (PREAMBLE.)

THE LORDS OF COUNCIL AND SESSION, in pursuance of the powers vested in them by the said Act, do hereby enact and declare,—

1st, That when a Petition is presented to the Commissary for the appointment of an Executor, the Commissary-Clerk of Edinburgh shall transmit, in a safe and convenient manner, and the other Commissary-Clerks shall transmit, through the Post Office to the Keeper of the Record of Edictal Citations at Edinburgh, a Note specifying the names and designations of the Petitioner, and of the deceased person, the place and date of his death, and the character in which the Petitioner seeks to be decerned Executor; and the said Note of Particulars shall be framed as nearly as may be in the form of Schedule B, annexed to the said Act, and shall be dated and subscribed by the Commissary-Clerk.

2nd, That the Keeper of the Record of Edictal Citations shall transmit, through the Post Office, to the Commissary-Clerk, a certified copy of the printed and published particulars, in the form of Schedule B annexed to

the said Act, and which copy shall be dated and subscribed by the said Keeper, and the said certified Abstracts shall be preserved by the Commissary-Clerk, and made patent to all persons desiring to see the same, on payment of the fee specified in the Table hereto annexed.

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Sederunt,  
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3<sup>rd</sup>, That the Copies of the Abstracts of Petitions for the appointment of an Executor shall be printed by the Keeper of the Record of Edictal Citations, and sold to the public at such prices as may be estimated to be sufficient to pay the expense of printing the same; and the printing and sale of the said Abstracts shall be subject to the same regulations as those applicable to the Minute Book and Record of Edictal Citations, by the 22<sup>nd</sup> section of the Act 1 and 2 Victoria, chapter 118.

7<sup>th</sup>, That the Certificate to be granted by the Commissary-Clerk of the County of Edinburgh upon grants of Probate and Administration, in terms of Section 14 and Schedule F of the Act, shall be dated as well as subscribed by him.

8<sup>th</sup>, That all copies of Probates or Letters of Administration deposited with the Commissary Clerk of the County of Edinburgh, under the 14<sup>th</sup> section of the said Act, shall be made patent to all Persons desiring to see the same, on payment of the Fee specified in the Table hereto annexed; and when required, the said Commissary-Clerk shall furnish copies or excerpts of said documents, on payment of the Fee specified in the said Table.

11<sup>th</sup>, That the said Clerks, and their successors in office, shall enter, in a book to be kept by them for the purpose, an accurate account of the whole Fees and Emoluments received by them from the commencement of this Act, and shall, on the 1<sup>st</sup> of April in each year, or within ten days thereafter, transmit to the Queen's Remembrancer in Exchequer an Abstract of the Fees and Emoluments received by them for the year immediately preceding, in order that the amount of such Fees and Emoluments may be known.

DUN. M'NEILL, I.P.D.

# X.—CONFIRMATION AND PROBATE AMENDMENT ACT, 1859, 22 VICT. CAP. 30.

*An Act to amend the "Confirmation and Probate Act 1858"*  
[19<sup>th</sup> April 1859].

1. All persons and corporations who, in reliance upon any instrument purporting to be a confirmation granted under the "Confirmation and Probate Act 1858," and all persons and corporations who, in reliance upon any such instrument which may be sealed under the authority of the said Act, with the seal of the Principal Court of Probate in *England*, or of the Court of Probate in *Dublin*, and all persons or corporations who, in reliance upon any instrument purporting to be a probate or letters of administration granted by the Court of Probate in *England*, or Court of Probate in *Dublin*, and having indorsed or written thereon a certificate by the Com- Persons, etc., making payments upon confirmations and probates under Act 1858, to be indemnified.

**APPENDIX X.** missary Clerk of *Edinburgh* in the form in the said Confirmation and Probate Act prescribed, shall have made or permitted to be made, or shall make or permit to be made, any payment or transfer *bona fide* upon any such confirmation, probate, or letters of administration, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such confirmation, probate, or letters of administration.

Short title.

2. This Act may be cited as the "Confirmation and Probate Amendment Act 1859."

# **XI.—WILLS OF BRITISH SUBJECTS ACT, 1861,—24 AND 25 VICT. CAP. 114.**

*An Act to amend the Law with respect to Wills of Personal Estate made by British Subjects [6th Aug. 1861].*

Wills made out of the Kingdom to be admitted if made according to the law of the place where made.

1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin.

Wills made in the Kingdom to be admitted if made according to local usage.

2. Every will and testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

Change of domicile not to invalidate will.

3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.

Nothing in this Act to invalidate wills otherwise made.

4. Nothing in this Act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this Act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act.

Extent of Act.

5. This Act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this Act.

XII.—INTESTATES' WIDOWS AND CHILDREN (SCOTLAND)  
ACT, 1875,—38 AND 39 VICT. CAP. 41.

*An Act for the Relief of Widows and Children of Intestates in Scotland where the personal estate is of small value.*—[19th July 1875.]

1. This Act may be cited for all purposes as the Intestates Widows and Children (Scotland) Act, 1875.

2. This Act shall extend to Scotland only.

Extent of Act

3. Where estate does not exceed £150, widow or children may apply to commissary clerk to fill up inventory and expedite confirmation.

4. Proof of identity and relationship may be required.

5. Commissary clerk may refuse to proceed if not satisfied that whole estate not more than £150.

6. Commissary clerk may administer oath.

"Commissary clerk" to include "commissary clerk deputy."

7. Procedure and fees under this Act to be regulated by act of sederunt.

3. Where the whole personal estate and effects of an intestate dying domiciled in Scotland shall not exceed in value the sum of one hundred and fifty pounds, his widow or any one or more of his children, or in the case of an intestate widow any one or more of her children, may apply to the commissary clerk of the county within which the intestate was domiciled at the time of death; and the said commissary clerk shall prepare and fill up an inventory and relative oath, as nearly as may be in the form of Schedule A appended to this Act, and shall take the oath of the applicant thereto, and on caution being found by the applicant according to the practice of the commissary court shall proceed to record said inventory and expedite confirmation in the form as nearly as may be of Schedule B annexed to this Act, and shall deliver the same to the applicant without the payment of any fee therefor save as is provided in Schedule C annexed to this Act: Provided always, that where the value of the said estate and effects exceeds the sum of one hundred pounds the said inventory shall be duly stamped before being recorded; and such confirmation shall have the same force and effect as that prescribed in Schedule D annexed to the Act of the twenty-first and twenty-second Victoria, chapter fifty-six; and where such confirmation shall contain English or Irish estate the Registrar of any Probate Court in England or Ireland shall affix the seal of the said court thereto on the confirmation being sent to him by the commissary clerk for that purpose enclosing a fee of two shillings and sixpence.

4. The commissary clerk of the county may require such proof as he may think sufficient to establish the identity and relationship of the applicant.

5. If the commissary clerk of the county has reason to believe that the whole personal estate and effects of which the intestate died possessed exceed in value one hundred and fifty pounds, he shall refuse to proceed with the application until he is satisfied as to the real value thereof.

6. All commissary clerks shall for the purpose of this Act have power and are hereby authorised to administer oaths and to take declarations and affirmations. The term "commissary clerk" shall throughout this Act include "commissary clerk deputy."

7. Any rules and orders and tables of fees requisite for carrying this Act into operation shall be framed and may from time to time be altered by the Court of Session by act of sederunt; but the total amount to be charged to applicants shall not in any case exceed the sums mentioned in the Schedule C, annexed to this Act.

APPENDIX  
XII.8. Inventory  
duty not  
affected by  
this Act.

8. Provided always, that nothing herein contained shall be construed to affect any duty now payable on inventories of personal estate.

(NOTE.—*Schedules A and B, altered so as to give effect to subsequent Acts will be found in the Appendix of Forms [FORMS 71 and 84].*)

## SCHEDULE C.

Where the whole estate and effects of the intestate shall not exceed in value twenty pounds, the sum of five shillings, and where the whole estate and effects shall exceed in value twenty pounds, the sum of five shillings and the further sum of one shilling for every ten pounds or fraction of ten pounds by which the value shall exceed twenty pounds.

XIII.—SMALL TESTATE ESTATES (SCOTLAND) ACT, 1876,  
39 AND 40 VICT. CAP. 24.

*An Act for the Relief of the Executors of Testates in Scotland where the Personal Estate is of small Value.*—[13th July 1876.]

## Short title.

1. This Act may be cited for all purposes as “The Small Testate Estates (Scotland) Act 1876.”

Extent of  
Act.

Where estate  
does not  
exceed £150,  
executor may  
apply to  
commissary  
clerk to fill  
up inventory  
and expedite  
confirmation.

2. This Act shall extend to Scotland only.

3. Where the whole real and personal estate and effects of a testate dying domiciled in Scotland shall not exceed in value the sum of one hundred and fifty pounds, the executor of such testate may apply to the commissary clerk of the county within which such testate was domiciled at the time of death; and the said commissary clerk, on production of the will or other writing of the testate containing the nomination of an executor, shall prepare and fill up an inventory and relative oath, as nearly as may be in the form of Schedule A appended to this Act, and, upon such inventory being duly sworn to by the executor, shall proceed to record said will or other writing and inventory and expedite confirmation in the form as nearly as may be of Schedule B annexed to this Act, and shall deliver the same to the executor without the payment of any fee therefor save as is provided in Schedule C annexed to this Act; and such confirmation shall have the same force and effect as that prescribed in Schedule E annexed to the Act of the twenty-first and twenty-second Victoria, chapter fifty-six; and where such confirmation shall contain English or Irish estate, the registrar of any Probate Court in England or Ireland shall affix the seal of the said Court thereto on the confirmation being sent to him by the commissary clerk for that purpose, enclosing a fee of two shillings and sixpence.

4. Proof of  
identity.

4. The commissary clerk of the county may require such proof as he may think sufficient to establish the identity of the executor.

5. Commis-  
sary clerk

must be  
satisfied that  
whole estate  
is under  
£150.

5. If the commissary clerk of the county has reason to believe that the whole real and personal estate and effects of which the testate died pos-

assessed exceed in value one hundred and fifty pounds, he shall refuse to proceed with the application until he is satisfied as to the true value thereof.

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XIII.

6. Oaths or affirmations under this Act or under the Intestates' Widows and Children (Scotland) Act 1875, shall, notwithstanding anything to the contrary in the last-mentioned Act, be administered in the manner provided by section 11 of the Confirmation and Probate Act 1858.

6. Who may administer oath.

7. Any rules and orders and tables of fees requisite for carrying this Act into operation shall be framed and may from time to time be altered by the Court of Session by Act of Sederunt; but the total amount to be charged to executors shall not in any case exceed the sums mentioned in Schedule C annexed to this Act.

Procedure and fees.

8. Provided always, that nothing herein contained shall be construed to affect any duty now payable on inventories of personal estate.

Inventory duty not affected.

(NOTE.—Schedules A and B altered so as to give effect to subsequent Acts will be found in the Appendix of Forms [FORMS 71 and 83].)

#### SCHEDULE C.

##### TABLE OF FEES.

Where the whole personal estate and effects of the testate shall not exceed in value *twenty pounds*, the sum of *five shillings*, and where the whole estate and effects shall exceed in value *twenty pounds*, the sum of *five shillings*, and the further sum of *one shilling* for every *ten pounds* or fraction of *ten pounds* by which the value shall exceed *twenty pounds*; together with the ordinary fees exigible for recording the will or other writing of the testate.

#### XIV. SHERIFF COURTS (SCOTLAND) ACT, 1876,—39 AND 40 VICT.

CAP. 70 [15TH AUGUST 1876].—SECTIONS 35 TO 45 INCLUSIVE.

(By section 2 the commencement of the Act is fixed at 1st October 1876, and by section 3 "Sheriff Clerk" includes Sheriff Clerk Depute, and in Part VIII. means Commissary Clerk in those cases in which such office is not abolished.)

#### VII.—THE COMMISSARY COURTS ABOLISHED.

35. From and after the commencement of this Act the commissary courts in Scotland shall be and the same are hereby abolished, and the whole powers and jurisdictions of the commissary court in each commissariot shall be and the same are hereby transferred to the sheriff in office at the commencement of this Act as the commissary of such commissariot, who shall thereafter, and his successors in office as sheriff, possess and exercise the whole of the said powers and jurisdictions in all respects :

Commissary courts abolished, and powers transferred to sheriffs.

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XIV.

Office of  
commissary  
clerk in cer-  
tain cases  
abolished.

Vacancies  
in office of  
commissary  
clerk not to  
be supplied.

All commis-  
sary clerks,  
except in  
Edinburgh,  
to be abol-  
ished on  
vacancies  
occurring.

Commissary  
clerks con-  
tinuing in  
office to per-  
form the  
duties in the  
sheriff court.

Provisions  
to have effect  
on the aboli-  
tion of the  
office of  
commissary  
clerk.

Provided that it shall be competent and proper to affix the seal of office of a Commissariot to all documents to which it would have been competent and proper to affix the same before the commencement of this Act.

36. In every case in which in any sheriffdom the offices of sheriff clerk and of commissary clerk shall at the commencement of this Act be united in the same person, who is remunerated by salary for discharging the duties of both offices, the office of commissary clerk shall be as from the said date and the same is hereby abolished, and the whole powers and duties of the office of commissary clerk shall be as from the said date and the same are hereby transferred to the office of sheriff clerk, and the sheriff clerk shall thereafter, and his successors in office as sheriff clerk, possess and exercise the whole of the said powers and perform the whole of the said duties.

37. No vacancy existing at the commencement of this Act, or which may thereafter occur in the office of a commissary clerk, except the office of the commissary clerk of Edinburgh, shall be supplied.

38. In every case of a vacancy occurring after the commencement of this Act in the office of commissary clerk in any commissariot in Scotland, except the commissariot of Edinburgh, such office shall be, as from the date of the occurrence of such vacancy, abolished, and the whole powers and duties of the office of commissary clerk shall be transferred to the office of the sheriff clerk of the county, and the sheriff clerk of the county shall thereafter, and his successors in office as sheriff clerk, possess and exercise the whole of the said powers and perform the whole of the said duties.

39. From and after the commencement of this Act every commissary clerk whose office shall not be forthwith abolished under the provisions of this Act, shall perform in the sheriff court of the county all the duties and exercise all the powers heretofore performed and exercised by him in the commissary court; provided such commissary clerk shall not be disabled from acting as a procurator in the sheriff court, except in causes in which he acts as clerk of court.

40. On the office of commissary clerk being in any case abolished under the provisions hereinbefore contained, the following provisions shall have effect:—

- (1.) All records, books, documents, papers, and things belonging to the office of the commissary clerk, or in the possession of any clerk or officer of that office as such, shall be forthwith transferred to the office or offices of the sheriff clerk of the county.
- (2.) It shall be lawful for the Lords Commissioners of Her Majesty's Treasury to regulate the office of such sheriff clerk, and out of moneys to be voted by Parliament to award him such salary or personal remuneration, together with such allowances for clerks and office expenses as shall seem just, having regard to the additional duties imposed upon him, and to the increased expenses of his office consequent on the transfer thereto of the duties of the office of commissary clerk.
- (3.) The sheriff clerk shall account for and pay to the Queen's and Lord

Treasurer's Remembrancer, on behalf of Her Majesty, all fees received in his office in connection with the new business by this Act transferred to his office.

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#### VIII.—AMENDMENT OF LAW AS TO CONFIRMATION OF EXECUTORS.

41. Where, under the provisions of the ninth and subsequent sections of the Act passed in the twenty-first and twenty-second years of the reign of Her present Majesty, chapter fifty-six, intituled "An Act to amend the law relating to the confirmation of executors in Scotland, and to extend over all parts of the United Kingdom the effect of such confirmation and of grants of probate and administration," it shall be desired to include in the inventory of the personal estate of any person dying domiciled in Scotland, personal estate situated in England or Ireland, it shall not be necessary to have a special proceeding before the sheriff with the view to his pronouncing therein an interlocutor finding that the deceased died domiciled in Scotland. That fact shall be set forth in the affidavit to the inventory, and it being so set forth therein shall be sufficient warrant for the sheriff clerk to insert in the confirmation, or to note thereon and sign a statement that the deceased died domiciled in Scotland; and such statement shall have the same effect as a certified copy interlocutor finding that the deceased person died domiciled in Scotland; and sections twelve and thirteen of the said Act, so far as they make it a condition of the sealing of a confirmation in the principal Court of Probate in England, or in the Court of Probate in Dublin, that the copy of the confirmation provided to be deposited with the registrar shall be accompanied by such a certified copy interlocutor, are hereby repealed.

*Note in confirmation by sheriff clerk or commissary clerk that deceased died domiciled in Scotland substituted for certified copy interlocutor by the sheriff commissary and to have like effect.*

42. When an additional inventory has been given in and recorded and confirmation granted in a sheriff court in Scotland of estate situated in England or Ireland of a person who died domiciled in Scotland, and the additional confirmation shall be produced in the principal Court of Probate in England, or in the Court of Probate in Dublin, as the case may be, and a copy thereof deposited with the registrar of the Court, such additional confirmation shall be sealed with the seal of the Court and returned to the person producing the same, and that whether the original confirmation shall have been sealed with the seal of the Court or not, and although the additional inventory confirmed shall not contain any estate of the deceased situated in Scotland, and such additional confirmation when so sealed shall thereafter have the same force and effect as if probate or letters of administration, as the case may be, had been granted by the Court of Probate in which it had been sealed.

*Extensions of the provisions of sections 12 and 13 of 21 and 22 Vict. c. 56.*

43. When any confirmation or additional confirmation of personal estate situated in Scotland, which shall contain or have appended thereto and signed by the sheriff clerk a note or statement of funds in England or Ireland, or both, held by the deceased in trust, shall be produced in the principal Court of Probate in England, or in the Court of Probate in Dublin, as the case may be, such confirmation shall be sealed with the seal

*Confirmation of Scotch estate with note of trust funds in England or Ireland to be sealed in Probate Courts as if*

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it contained  
English or  
Irish estate  
of the de-  
ceased.

Schedule C  
of 21 and 22  
Vict. c. 56,  
hereby re-  
pealed, and  
new form of  
intimation,  
etc.

A calendar  
of confirma-  
tions and  
inventories  
to be pub-  
lished annu-  
ally.

of such court in the same manner as is provided by sections twelve and thirteen of the Act passed in the twenty-first and twenty-second years of the reign of Her present Majesty, chapter fifty-six, as amended by this Act, with respect to sealing confirmations which include personal estate situated in England or Ireland respectively; and such confirmation shall thereafter have the like force and effect in England and Ireland with respect to such funds as if probate or letters of administration, as the case may be, had been granted by the Court of Probate in which it had been sealed; and such note or statement may be inserted or appended as aforesaid by the sheriff clerk, provided the same shall have been set forth in any inventory which has been recorded in the books of the Court of which he is clerk.

44. The sheriff clerk shall, after a petition for the appointment of an executor has been intimated by him as provided by section four of the Act passed in the twenty-first and twenty-second years of the reign of Her present Majesty, chapter fifty-six, and after receiving the certified copy of the printed and published particulars therein set forth, forthwith certify these facts on the petition in the following or similar terms: "Intimated and published in terms of the statute," which certificate (in lieu of the certificate in the form of Schedule C annexed to the said Act, which Schedule C is hereby repealed), shall be dated and signed by him, and shall be sufficient evidence of the facts therein set forth: Provided always that special intimation shall be made to all executors already decerned or confirmed to a deceased person of any subsequent petition for the appointment of an executor which may be presented with reference to the personal estate of the same deceased person.

45. It shall be the duty of the Commissary Clerk of Edinburgh on or before the thirty-first day of December one thousand eight hundred and seventy-seven, and on or before the thirty-first day of December in every year thereafter, to prepare and issue a printed calendar containing a list or register, alphabetically arranged, of all confirmations granted, and of all inventories given in, in cases in which from any cause confirmation shall not have been required in Scotland, in the year ending on the thirty-first day of December immediately preceding, specifying in each case the name and designation, and the place and date of death of the person deceased; whether he died testate or intestate; the names and designations of his executors; date of confirmation or recording of inventory; the date of the will or deed, if any; and where and of what date the same was registered; and the value of the estate: Provided as follows:—

- (1.) It shall be the duty of every sheriff clerk to furnish to the Commissary Clerk of Edinburgh on or before the fifteenth day of February one thousand eight hundred and seventy-seven such a list or register of confirmations granted, and inventories given in, within the sheriffdom of which he is such clerk (with all the particulars above specified) in the year ending on the thirty-first day of December immediately preceding; and thereafter quarterly, on or before the first days of February, May, August, and November in each year, to furnish to the Commissary Clerk of Edinburgh

such a list or register, with such particulars as aforesaid, of all confirmations and inventories granted, or given in, within such sheriffdom in the quarters ending on the thirty-first day of December, the thirty-first day of March, the thirtieth day of June and the thirtieth day of September immediately preceding respectively.

- (2.) A copy of every such calendar issued shall be sent by the Commissary Clerk of Edinburgh to every sheriff clerk in Scotland, who shall keep the same in his office open for the inspection of the public on payment of such fee as may be fixed by Act of Sederunt, which the Court of Session are hereby authorised and required to pass :
- (3.) A copy of every issue of such calendar shall also be sent to the Lord Clerk Register and to the registrars in the Probate Courts of London and Dublin :
- (4.) The cost of preparing and printing and issuing such calendar and of furnishing copies thereof to the persons to whom they are herein directed to be sent shall be defrayed out of moneys to be voted by Parliament.

#### XV.—ACT OF SEDERUNT, 15TH JANUARY 1890.

*Act of Sederunt to regulate the Places in each County at which Commissary Business shall be conducted, and the mode of procedure, and fees of Court to be paid in certain Commissary Causes. (SO FAR AS STILL IN FORCE.)*

##### (PREAMBLE.)

The Lords of Council and Session do hereby enact and ordain as follows :—

1. The business conducted previous to the passing of the said last recited Act [39 and 40 Vict. c. 70] in the Commissary Courts, and by that Act transferred to the Sheriff Courts in Scotland, shall continue to be conducted at the same places in each Commissariat as at the passing of the said Act, and also at the following places, viz. :—In the Commissariat of the county of Renfrew, at Greenock in addition to Paisley ; and in the Commissariat of the county of Lanark, at Lanark, Airdrie, and Hamilton, in addition to Glasgow.

2. Where, under the provisions of the said last recited Act, the office of Commissary Clerk has been or shall be abolished, and the powers and duties of said office transferred to the Sheriff Clerk of the county, it shall be competent in the case of persons who may have died domiciled in any of the districts into which such county may be divided for ordinary Sheriff Court purposes, to present petitions in Commissary causes, relating to the estates of such persons, in the Sheriff Court of such district ; but it shall not be competent to record inventories or expedite confirmations except at the places specified in the preceding section of this Act.

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3. Where, under the provisions of the last recited Act, the records books, documents, papers, and things belonging to the office of Commissary Clerk have been or shall be transferred to the office or offices of the Sheriff Clerk of the county, such records, books, documents, papers, and things shall be kept in the custody of the Sheriff Clerk at the places where confirmation in the causes to which they relate has been or may be expedite.

4. In any Commissariat where confirmations may be expedite or petitions presented at more places than one, a caveat lodged with the proper officer at any one of such places shall be held to apply to the whole Commissariat, and a copy thereof shall forthwith be transmitted by such officer to any other place or places within the Commissariat where the application against which the caveat is lodged might competently be made.

5. Where an inventory of personal estate with any relative writs is sent by post by an executor or any duly qualified law agent in Scotland, acting on behalf of such executor, to any Commissary or Sheriff Clerk for registration in the books of his Court, such clerk shall not be entitled to insist on personal attendance to present such inventory, or that the inventory be presented by a local agent, but shall receive and record the same as having been presented by the sender, and transmit the confirmation and relative writs to the presenter by post, if required, on payment of the usual fees, and in addition a fee of three shillings and sixpence\* for each necessary letter, including postage: Provided always that nothing herein contained shall affect the procedure with reference to petitions in executry causes.

JOHN INGLIS, *I.P.D.*

\* Now covered by Confirmation fee.

XVI.—CUSTOMS AND INLAND REVENUE ACT, 1880,—43 VICT.  
CAP. 14 [24TH MARCH 1880], SECTIONS 9 AND 13.

PART III.—STAMPS.

Grant of  
duties on  
probates and  
letters of  
administration.

9. On and after the first day of April one thousand eight hundred and eighty, in lieu of the stamp-duties now payable upon probates of wills and letters of administration in England and Ireland, and upon inventories to be exhibited and recorded in any Commissary Court in Scotland, there shall be charged and paid the duties specified in the Schedule to this Act: Provided that an additional inventory to be so exhibited or recorded of any effects of a deceased person, where a former duly stamped inventory of the estate and effects of the same person has been exhibited and recorded prior to the first day of April one thousand eight hundred and eighty, shall be chargeable with the amount of stamp-duty with which it would have been chargeable if this Act had not been passed.

Relief from  
legacy duty  
when whole  
personal  
estate is less  
than £100.

13. Where it appears upon an examination of the account rendered to the Commissioners of Inland Revenue that the value of the whole of the personal estate of any person dying after the passing of this Act does not

amount to the sum of one hundred pounds, no legacy duty shall be charged in respect thereof of any portion thereof.

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SCHEDULE OF STAMP DUTIES ON PROBATES AND LETTERS OF ADMINISTRATION IN ENGLAND OR IRELAND AND ON INVENTORIES IN SCOTLAND.

Where the Estate and Effects for or in respect of which a Probate or Letters of Administration shall be granted, or whereof an Inventory shall be exhibited and recorded, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person, and not beneficially, shall be :—

(Superseded except as regards additional inventories, page 251.)

				DUTY
Above the value of £100 and under £200				£2
Of the value of .....	200	...	300	4
...	300	...	400	6
...	400	...	500	9
...	500	...	600	11
...	600	...	800	15
...	800	...	1,000	22
...	1,000	...	1,500	30
...	1,500	...	2,000	40
...	2,000	...	3,000	62
...	3,000	...	4,000	88
...	4,000	...	5,000	113
...	5,000	...	6,000	140
...	6,000	...	7,000	165
...	7,000	...	8,000	190
...	8,000	...	9,000	215
...	9,000	...	10,000	240
...	10,000	...	12,000	275
...	12,000	...	14,000	325
...	14,000	...	16,000	375
...	16,000	...	18,000	425
...	18,000	...	20,000	475
...	20,000	...	25,000	565
...	25,000	...	30,000	690
...	30,000	...	35,000	815
...	35,000	...	40,000	940
...	40,000	...	45,000	1,065
...	45,000	...	50,000	1,190
...	50,000	...	60,000	1,375
...	60,000	...	70,000	1,625
...	70,000	...	80,000	1,875
...	80,000	...	90,000	2,125
...	90,000	...	100,000	2,375
...	100,000	...	120,000	2,750
...	120,000	...	140,000	3,250

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Of the value of.....				Duty
	£140,000 and under	£160,000		£3,750
...	160,000	...	180,000	4,250
...	180,000	...	200,000	4,750
...	200,000	...	250,000	5,625
...	250,000	...	300,000	6,875
...	300,000	...	350,000	8,125
...	350,000	...	400,000	9,375
...	400,000	...	500,000	11,250
	500,000 and upwards, then, in addition to the said duty of £11,250, for every full sum of £100,000 in ex- cess of £500,000, and also for any fractional part of £100,000 so in excess,			2,500

XVII.—CUSTOMS AND INLAND REVENUE ACT 1881,—44 VICT.  
CAP. 12 [3RD JUNE 1881], SECTIONS 27, 28, 33–38, 41, 42.

## PART III.—STAMPS.

*As to Probate and Legacy Duties, and Duties on Accounts.*Grant of  
duties in  
respect of  
probate and  
letters of  
administra-  
tion and on  
inventories.

27. The duties imposed by the Customs and Inland Revenue Act 1880, upon probates of wills and letters of administration in England and Ireland shall not be payable upon probates or letters of administration granted on and after the first day of June one thousand eight hundred and eighty-one; and on and after that day, in substitution for such duties, and in lieu of the duties imposed by the said Act upon inventories in Scotland, there shall, save as is hereinafter expressly provided, be charged and paid on the affidavit to be required and received from the person applying for the probate or letters of administration in England or Ireland, or on the inventory to be exhibited and recorded in Scotland, the stamp-duties hereinafter specified; (that is to say)

Where the estate and effects for or in respect of which the probate or letters of administration is or are to be granted, or whereof the inventory is to be exhibited and recorded, exclusive of what the deceased shall have been possessed of or entitled to as trustee, and not beneficially, shall be above the value of £100, and not above the value of £500, . . .

## Duty.

At the rate of one pound for every full sum of £50, and for any fractional part of £50 over any multiple of £50;

Where such estate and effects shall be  
above the value of £500, and not  
above the value of £1000, . . .

DUTY.

At the rate of one pound five  
shillings for every full sum  
of £50, and for any fractional  
part of £50 over any mul-  
tiple of £50 ;

Where such estate and effects shall be  
above the value of £1000, . . .

At the rate of three pounds  
for every full sum of £100,  
and for any fractional part  
of £100 over any multiple  
of £100 ;

Provided that an additional inventory, to be exhibited or recorded in Scotland, of any effects of a deceased person, where a former inventory of the estate and effects of the same person has been exhibited and recorded prior to the first day of June one thousand eight hundred and eighty-one, shall be chargeable with the amount of stamp-duty with which it would have been chargeable if this Act had not been passed.

28. On and after the first day of June one thousand eight hundred and eighty-one, in the case of a person dying domiciled in any part of the United Kingdom, it shall be lawful for the person applying for the probate or letters of administration in England or Ireland, or exhibiting the inventory in Scotland, to state in his affidavit the fact of such domicile, and to deliver therewith or annex thereto a schedule of the debts due from the deceased to persons resident in the United Kingdom, and the funeral expenses, and in that case, for the purpose of the charge of duty on the affidavit or inventory, the aggregate amount of the debts and funeral expenses appearing in the schedule shall be deducted from the value of the estate and effects as specified in the account delivered with or annexed to the affidavit, or whereof the inventory shall be exhibited.

Power to  
deduct debts  
and funeral  
expenses  
where de-  
ceased died  
domiciled in  
the United  
Kingdom.

Debts to be deducted under the power hereby given shall be debts due and owing from the deceased, and payable by law out of any part of the estate and effects comprised in the affidavit or inventory, and are not to include voluntary debts expressed to be payable on the death of the deceased, or payable under any instrument which shall not have been *bond fide* delivered to the donee thereof three months before the death of the deceased, or debts in respect whereof any real estate may be primarily liable or a reimbursement may be capable of being claimed from any real estate of the deceased or from any other estate or person.

Funeral expenses to be deducted under the power hereby given shall include only such expenses as are allowable as reasonable funeral expenses according to law.

33. (1). Where the whole personal estate and effects of any person dying on or after the first day of June one thousand eight hundred and eighty-one (inclusive of property by law made such personal estate and effects for the purpose of the charge of duty, and any personal estate and

Provisions  
as to obtain-  
ing probate,  
etc., where  
gross value  
of estate  
does not  
exceed £300.

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effects situate out of the United Kingdom), without any deduction for debts or funeral expenses, shall not exceed the value of three hundred pounds, it shall be lawful for the person intending to apply for probate or letters of administration in England or Ireland, to deliver to the proper officer of the Court, or to any officer of Inland Revenue duly appointed for the purpose, a notice in writing in the prescribed form, setting forth the particulars of such estate and effects, and such further particulars as may be required to be stated therein, and to deposit with him the sum of fifteen shillings for fees of Court and expenses, and also, in case the estate and effects shall exceed the value of one hundred pounds, the further sum of thirty shillings for stamp-duty.

(2.) If the officer has good reason to believe that the whole personal estate and effects of the deceased exceeds the value of three hundred pounds, he shall refuse to accept the notice and deposit until he is satisfied of the true value thereof.

(5.) Where the estate and effects shall exceed the value of one hundred pounds, the stamp-duty payable on the affidavit for the Commissioners of Inland Revenue shall be the fixed duty of thirty shillings, and no more.

Provision as to inventories where gross value of estate does not exceed £300.  
39 and 40 Vict. c. 24.  
39 and 40 Vict. c. 79.

34. (1.) The Intestates Widows and Children (Scotland) Act 1875, and the Small Testate Estates (Scotland) Act 1876, as amended by the Sheriff Courts (Scotland) Act 1876, shall be extended so as to apply to any case where the whole personal estate and effects of a person dying on or after the first day of June one thousand eight hundred and eighty-one, without any deduction for debts or funeral expenses, shall not exceed the value of three hundred pounds, whoever may be the applicant for representation, and wheresoever the deceased may have been domiciled at the time of death, and the fees payable under Schedule C of each of the two first-mentioned Acts shall not exceed the sum of fifteen shillings, inclusive of the fee of two shillings and sixpence, to be paid to the Commissary clerk or Sheriff clerk.

(2.) In any such case, where the estate and effects shall exceed the value of one hundred pounds, the stamp-duty payable on the inventory shall be the fixed duty of thirty shillings and no more.

Provision in case of subsequent discovery that the value of estate exceeded £300.

35. Where representation has been obtained in conformity with either of the two preceding sections, and it shall be at any time afterwards discovered that the whole personal estate and effects of the deceased were of a value exceeding three hundred pounds, then a sum equal to the stamp-duty payable on an affidavit or inventory in respect of the true value of such estate and effects shall be a debt due to Her Majesty from the person acting in the administration of such estate and effects, and no allowance shall be made in respect of the sums deposited or paid by him, nor shall the relief afforded by the next succeeding section be claimed or allowed by reason of the deposit or payment of any sum.

Relief from legacy duty in cases under £300.

36. The payment of the sum of thirty shillings for the fixed duty on the affidavit or inventory in conformity with this Act shall be deemed to be in full satisfaction of any claim to legacy duty or succession duty in respect of the estate or effects to which such affidavit or inventory relates.

37. It shall be lawful for the Commissioners of Inland Revenue at any time and from time to time within three years after the grant of probate or letters of administration or recording of inventory, as they may think necessary, to require the person acting in the administration of the estate and effects of any deceased person, to furnish such explanations, and to produce such documentary or other evidence respecting the contents of, or particulars verified by, the affidavit or inventory as the case may seem to them to require.

38. (1.) Stamp-duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof.

(2.) The personal or moveable property to be included in an account shall be property of the following descriptions, viz. :—

- (a.) Any property taken as a *donatio mortis causa* made by any person dying on or after the first day of June one thousand eight hundred and eighty-one, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been *bond fide* made three months before the death of the deceased.
- (b.) Any property which a person dying on or after such day, having been absolutely entitled thereto, has voluntarily caused or may voluntarily cause to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person.
- (c.) Any property passing under any past or future voluntary settlement made by any person dying on or after such day, by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim, the absolute interest in such property.

41. In respect of any legacy, residue, or share of residue payable out of, or consisting of any estate or effects according to the value whereof duty shall have been paid on the affidavit or inventory or account, in conformity with this Act, the duty at the rate of one pound per centum imposed by the Act of the fifty-fifth year of King George the Third, chapter one hundred and eighty-four, shall not be payable ;

And in respect of any succession to property according to the value whereof duty shall have been paid on the affidavit or inventory or account in conformity with this Act, the duty at the rate of one pound per centum imposed by the Succession Duty Act 1853, shall not be payable.

42. Subject to the relief from legacy duty given by section thirteen of the Customs and Inland Revenue Act 1880, every pecuniary legacy or residue or share of residue under the will or the intestacy of a person dying on or

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XVII.

Power to Commissioners to require explanations and proof in support of affidavit or inventory.

Grant of duties on accounts of certain property.

(Amended by 62 Vict. c. 7, § 11.)

Cesser of legacy and succession duties at the rate of one per cent. in certain cases.

Charge of legacy duty on legacies not amounting to £20.

APPENDIX  
XVII.16 and 17  
Vict. c. 51.

after the first day of June one thousand eight hundred and eighty-one, although not of an amount or value of twenty pounds, shall be chargeable to the duties imposed by the said Act of the fifty-fifth year of King George the Third, chapter one hundred and eighty-four, as modified by this Act.

**XVIII.—CUSTOMS AND INLAND REVENUE ACT, 1889,  
52 VICT. CAP. 7 (31st May 1889), SECTIONS 5, 7, 11.**

**PART II.—STAMPS—ESTATE DUTY.**

Estate duty  
on personal  
property  
passing by  
will or on  
intestacy.

**5. (1.)** Where, in the case of any person applying for probate or letters of administration granted in England or Ireland on or after the 1st day of June 1889, or in the case of any person exhibiting an inventory in Scotland on or after that day, the value of the estate and effects in respect whereof duty is charged on the affidavit or inventory by section 27 of the Customs and Inland Revenue Act 1881, exceeds £10,000, he shall, together with such affidavit or inventory, deliver a statement of the value of such estate and effects. The statement shall be transmitted with the affidavit or inventory to the Commissioners of Inland Revenue by the proper officer of the High Court of Justice in England or Ireland, or of the proper court in Scotland, and the certificate required under section 30 of the said Act shall extend to, and include the fact of, the delivery of the statement.

(2.) Where the value of the personal or moveable property included in an account delivered according to section 38 of the Customs and Inland Revenue Act 1881, on or after the first day of June 1889, exceeds £10,000, the person delivering the account shall also deliver together therewith a statement of the value of such property.

(3.) Where, pursuant to the provisions of section 32 of the Customs and Inland Revenue Act 1881, a further affidavit is required to be delivered by any person, and where any person intromitting with, or entering upon the possession or management of, any personal or moveable estate or effects in Scotland of any person dying, is required by law to exhibit an additional inventory, the following provisions shall apply :—

(a.) If the value of the estate and effects in respect whereof duty was charged on the former affidavit or inventory under section 27 of the Customs and Inland Revenue Act, 1881, exceeded £10,000, the person delivering the further affidavit or exhibiting the additional inventory, shall deliver together therewith a statement of the value of the estate and effects included therein, or of the increase of value of the estate and effects included in the former affidavit or inventory, as the case may be :

(b.) If the value of the estate and effects in respect whereof duty has been charged under the Customs and Inland Revenue Act, 1881, did not exceed £10,000, and such value, together with the value of the estate and effects included in the further affidavit or additional inventory delivered or exhibited, or the increased value, as the case may be, exceeds £10,000, such person delivering the further affidavit or exhibiting the additional inventory shall deliver together therewith a statement of the value of the estate

and effects included therein, and in the former affidavit or inventory, or of the value as increased of the estate and effects included in the former affidavit or inventory, as the case may be.

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XVIII.

(4.) There shall be charged and paid on every statement to be delivered in conformity with this section a duty of £1 for every full sum of £100, and for any fraction of £100 over any multiple of £100 of the value of the estate and effects, or of the personal or moveable property, as the case may be.

(7.) Where a further affidavit or additional inventory is delivered or exhibited of any estate or effects of a deceased person, after a former affidavit or inventory of the estate and effects of the same person has been delivered or exhibited and recorded prior to the first day of June 1889, it shall not be necessary to deliver any statement of the value of the estate and effects of such person under this section.

7. The duties hereinbefore imposed by this part of this Act shall not be payable in respect of the value of the estate and effects of any person dying on or after the first day of June 1896, or of the value of any personal or moveable property included in an account by relation to the death of any person so dying, or in respect of the value of any succession upon the death of any person so dying, and statements of such values shall not be required.

Duration of  
charge of  
estate duty.

11. (1.) Sub-section 2 of section 38 of the Customs and Inland Revenue Act, 1881, is hereby amended, as follows :—

The description of property marked (a) shall be read as if the word “twelve” were substituted for the word “three” therein, and the said description of property shall include property taken under any gift, whenever made, of which property *bond fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise :

Amendment  
of 44 and 46  
Vict. c. 12,  
§ 38.

The description of property marked (b) shall be construed as if the expression “to be transferred to or vested in himself and any other person” included also any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone, or in concert, or by arrangement, with any other person :

The description of property marked (c) shall be construed as if the expression “voluntary settlement” included any trust, whether expressed in writing or otherwise, in favour of a volunteer, and, if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, and as if the expression “such property,” wherever the same occurs, included the proceeds of sale thereof :

The charge under the said section shall extend to money received under a policy of assurance effected by any person dying on or after the first day of June 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit.

XIX.—SUCCESSION DUTY ACT, 1853,—16 AND 17 VICT. CAP. 51.  
(4TH AUGUST 1853.) TABLE I. The Values of an Annuity of  
£100 per annum held on a single Life.

Years of Age.	Value.	Years of Age.	Value.
Birth, . . .	£1892 8 6	48 . . .	£1300 9 6
1 . . .	1906 13 0	49 . . .	1271 19 6
2 . . .	1919 2 0	50 . . .	1242 19 6
3 . . .	1926 8 0	51 . . .	1213 17 0
4 . . .	1928 16 0	52 . . .	1185 14 0
5 . . .	1926 19 6	53 . . .	1157 17 6
6 . . .	1921 12 0	54 . . .	1130 13 0
7 . . .	1913 4 6	55 . . .	1103 18 0
8 . . .	1902 16 6	56 . . .	1077 10 0
9 . . .	1890 19 6	57 . . .	1051 10 0
10 . . .	1878 3 0	58 . . .	1025 10 0
11 . . .	1864 7 0	59 . . .	999 1 0
12 . . .	1849 12 0	60 . . .	972 1 0
13 . . .	1833 18 6	61 . . .	943 15 6
14 . . .	1817 7 6	62 . . .	914 2 0
15 . . .	1800 8 6	63 . . .	883 6 0
16 . . .	1783 13 0	64 . . .	852 9 0
17 . . .	1767 16 0	65 . . .	821 12 6
18 . . .	1753 5 6	66 . . .	790 15 0
19 . . .	1740 11 0	67 . . .	761 19 0
20 . . .	1729 9 6	68 . . .	733 8 6
21 . . .	1719 17 0	69 . . .	705 4 0
22 . . .	1713 1 0	70 . . .	677 9 0
23 . . .	1706 16 6	71 . . .	650 8 0
24 . . .	1700 11 6	72 . . .	623 19 6
25 . . .	1694 0 0	73 . . .	597 7 6
26 . . .	1686 14 6	74 . . .	569 13 0
27 . . .	1677 5 6	75 . . .	541 0 6
28 . . .	1667 1 0	76 . . .	511 9 6
29 . . .	1656 1 0	77 . . .	477 17 0
30 . . .	1644 7 6	78 . . .	444 9 6
31 . . .	1632 0 0	79 . . .	412 9 6
32 . . .	1619 0 6	80 . . .	381 3 0
33 . . .	1605 4 0	81 . . .	350 14 6
34 . . .	1590 9 6	82 . . .	321 14 6
35 . . .	1574 17 6	83 . . .	292 10 0
36 . . .	1558 9 6	84 . . .	263 2 0
37 . . .	1541 10 6	85 . . .	234 18 6
38 . . .	1524 0 0	86 . . .	207 16 0
39 . . .	1506 1 6	87 . . .	184 11 6
40 . . .	1487 10 0	88 . . .	164 17 6
41 . . .	1468 4 0	89 . . .	148 7 0
42 . . .	1447 11 6	90 . . .	133 9 0
43 . . .	1426 2 0	91 . . .	122 16 0
44 . . .	1403 10 0	92 . . .	107 7 0
45 . . .	1379 14 6	93 . . .	93 3 0
46 . . .	1354 16 6	94 . . .	79 8 6
47 . . .	1328 2 6	95 . . .	64 11 0

## XX.—COLONIAL PROBATES ACT, 1892,

55 VICT. CAP. 6.

*An Act to provide for the recognition in the United Kingdom of Probates and Letters of Administration granted in British Possessions. [20th May 1892.]*

1. Her Majesty the Queen may, on being satisfied that the legislature of any British possession has made adequate provision for the recognition in that possession of probates and letters of administration granted by the courts of the United Kingdom, direct by Order in Council that this Act shall, subject to any exceptions and modifications specified in the Order, apply to that possession, and thereupon, while the Order is in force, this Act shall apply accordingly.

*Application of Act by Order in Council.*

2. (1.) Where a Court of Probate in a British possession to which this Act applies has granted probate or letters of administration in respect of the estate of a deceased person, the probate or letters so granted may, on being produced to, and a copy thereof deposited with, a court of probate in the United Kingdom, be sealed with the seal of that court, and thereupon, shall be of the like force and effect, and have the same operation in the United Kingdom, as if granted by that court.

*Sealing in United Kingdom of colonial probates and letters of administration.*

(2.) Provided that the court shall, before sealing a probate or letters of administration under this section, be satisfied—

(a.) that probate duty has been paid in respect of so much (if any) of the estate as is liable to probate duty in the United Kingdom ; and

(b.) in the case of letters of administration, that security has been given in a sum sufficient in amount to cover the property (if any) in the United Kingdom to which the letters of administration relate ;

and may require such evidence, if any, as it thinks fit as to the domicile of the deceased person.

(3.) The court may also, if it thinks fit, on the application of any creditor, require, before sealing, that adequate security be given for the payment of debts due from the estate to creditors residing in the United Kingdom.

(4.) For the purposes of this section, a duplicate of any probate or letters of administration sealed with the seal of the court granting the same, or a copy thereof certified as correct by or under the authority of the court granting the same, shall have the same effect as the original.

(5.) Rules of court may be made for regulating the procedure and practice, including fees and costs, in courts of the United Kingdom, on and incidental to an application for sealing a probate or letters of administration granted in a British possession to which this Act applies. Such rules shall, so far as they relate to probate duty, be made with the consent of the Treasury, and, subject to any exceptions and modifications made by such rules, the enactments for the time being in force in relation to probate duty (including the penal provisions thereof) shall apply as if the person who applies for sealing under this section were a person applying for probate or letters of administration.

APPENDIX  
XX.Application  
of Act to  
British  
courts in  
foreign  
countries.Orders in  
Council.Application  
of Act to  
probates,  
etc., already  
granted.

Definitions.

Short title.

3. This Act shall extend to authorise the sealing in the United Kingdom of any probate or letters of administration granted by a British court in a foreign country, in like manner as it authorises the sealing of a probate or letters of administration granted in a British possession to which this Act applies, and the provisions of this Act shall apply accordingly with the necessary modifications.

4. (1.) Every Order in Council made under this Act shall be laid before both houses of Parliament as soon as may be after it is made, and shall be published under the authority of Her Majesty's Stationery Office.

(2.) Her Majesty the Queen in Council may revoke or alter any Order in Council previously made under this Act.

(3.) Where it appears to Her Majesty in Council that the legislature of part of a British possession has power to make the provision requisite for bringing this Act into operation in that part, it shall be lawful for Her Majesty to direct by Order in Council that this Act shall apply to that part as if it were a separate British possession, and thereupon, while the Order is in force, this Act shall apply accordingly.

5. This Act when applied by an Order in Council to a British possession shall, subject to the provisions of the Order, apply to probates and letters of administration granted in that possession either before or after the passing of this Act.

6. In this Act—

The expression "court of probate" means any court or authority, by whatever name designated, having jurisdiction in matters of probate, and in Scotland means the Sheriff Court of the county of Edinburgh :

The expressions "probate" and "letters of administration" include confirmation in Scotland, and any instrument having in a British possession the same effect which under English law is given to probate and letters of administration respectively :

The expression "probate duty" includes any duty payable on the value of the estate and effects for which probate or letters of administration is or are granted :

The expression "British court in a foreign country" means any British court having jurisdiction out of the Queen's dominions in pursuance of an Order in Council, whether made under any Act or otherwise.

7. This Act may be cited as the Colonial Probates Act, 1892.

XXI.—RULES OF COURT MADE BY THE SHERIFF OF THE LOTHIANS AND PEBBLES FOR REGULATING THE PROCEDURE AND PRACTICE IN THE SHERIFF COURT OF EDINBURGH IN CONNECTION WITH THE COLONIAL PROBATES Act, 1892 (55 Vict. Cap. 6).

EDINBURGH, 9th June, 1893.

WHEREAS by the said Act, entitled "An Act to provide for the recognition in the United Kingdom of Probates and Letters of Administration granted

in British Possessions" (20th May 1892), it is enacted, Section 2 (5), that "Rules of the Court may be made for regulating the procedure and practice, including fees and costs in Courts of the United Kingdom on and incidental to an application for sealing a Probate or Letters of Administration granted in a British Possession to which this Act applies,"—The Sheriff enacts and ordains as follows :—

1. When any Probate or Letters of Administration granted by a Court of Probate in any British Possession to which this Act applies is produced along with a copy thereof in the Sheriff Court of Edinburgh, it shall be sealed by the Commissary Clerk with the Seal of Office of the Commissariat of Edinburgh.

*Provided—*

- (1) That a duly stamped Inventory, with relative Oath in the ordinary form modified to suit the circumstances, has been exhibited in said Court, which Inventory, after being recorded, shall be transmitted to the Commissioners of Inland Revenue : but it shall not be necessary to record along with said Inventory any Testamentary Writings of which a copy is deposited in terms of the Act.
- (2) That in the case of Letters of Administration, Caution has been found to cover the Estate in Scotland given up in such Inventory, and that such caution shall be subject to the same rules as regards restriction thereof, the terms of the bond and otherwise, as are applicable to caution for Executors dative.
- (3) That no application has been made under Sub-section 3 of Section 2 of the Act, or that such application has been disposed of, and that any such application shall be by Petition to the Sheriff.

2. The Oath to the Inventory shall set forth the domicile of the deceased at the time of his death ; and where, on any ground, it may appear doubtful whether the person or persons in whose favour the grant of Probate or Letters of Administration has been made, would be entitled to confirmation in Scotland, such grant shall not be sealed without the special authority of the Sheriff.

3. The Commissary Clerk shall, by a note on the document sealed, set forth that it is sealed under and in terms of the Colonial Probates Act, 1892, and the amount of the Estate in Scotland, and such note shall be dated and signed by him.

4. The ordinary fees shall be charged for examining and recording the Inventory and Oath ; the fees chargeable for sealing Probates and Letters of Administration shall be the same as those chargeable for granting Certificates on English and Irish Probates and Letters of Administration ; and the fees chargeable for Bonds of Caution shall be the same as those chargeable for Bonds of Caution for Executors dative.

ALEXR. BLAIR.

## XXII.—FINANCE ACT, 1894.

57 AND 58 VICT. CAP. 30 (31ST JULY 1894).

## PART I.

## ESTATE DUTY.

## Section

1. Grant of Estate duty.
2. What property is deemed to pass.
3. Exception for transactions for money consideration.
4. Aggregation of property to form one estate for purpose of duty.
5. Settled property.
6. Collection and recovery of Estate duty.
7. Value of property.
8. Supplemental provisions as to collection, recovery, and repayment of and exemption from Estate duty.
9. Charge of Estate duty on property and facilities for raising it.
10. Appeal from Commissioners.
11. Release of persons paying Estate duty.
12. Commutation of duty on interest in expectancy.
13. Powers to accept composition for death duties.
14. Apportionment of duty.
15. Exemptions from Estate duty.
16. Provision for estates not exceeding £1000.
17. Scale of rates of Estate duty.
18. Value of real successions for succession duty.
19. Adaptation of law as to probate duty grant.
20. Exception as to property in British Possessions.
21. Savings.
22. Definitions.
23. Application of part of Act to Scotland.
24. Commencement of part of Act.

*Grant of Estate Duty.*Grant of  
Estate  
duty.

1. In the case of every person dying after the commencement of this Part of this Act, there shall, save as herein-after expressly provided, be levied and paid, upon the principal value ascertained as herein-after provided of all property, real or personal, settled or not settled, which passes on the death of such person, a duty, called "Estate duty," at the graduated rates herein-after mentioned, and the existing duties mentioned in the First Schedule to this Act shall not be levied in respect of property chargeable with such Estate duty.

What  
property is  
deemed  
to pass.

2.—(1.) Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—

- (a.) Property of which the deceased was at the time of his death competent to dispose ;

APPENDIX  
XXII.

(b.) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole;

(c.) Property which would be required on the death of the deceased to be included in an account under section thirty-eight of the Customs and Inland Revenue Act, 1881,<sup>1</sup> as amended by section eleven of the Customs and Inland Revenue Act, 1889,<sup>2</sup> if those sections were herein enacted and extended to real property as well as personal property, and the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom; and

44 and 45  
Vict. c. 12.  
52 and 58  
Vict. c. 7.

(d.) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

(See Act of  
1896, § 16.)

(2.) Property passing on the death of the deceased when situate out of the United Kingdom shall be included only, if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes.

(3.) Property passing on the death of the deceased shall not be deemed to include property held by the deceased as trustee for another person, under a disposition not made by the deceased, or under a disposition made by the deceased more than twelve months before his death, where possession and enjoyment of the property was *bond fide* assumed by the beneficiary immediately upon the creation of the trust and thenceforward retained to the entire exclusion of the deceased or of any benefit to him by contract or otherwise.

3.—(1.) Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a *bond fide* purchase from the person under whose disposition the property passes, nor in respect of the falling into possession of the reversion on any lease for lives, nor in respect of the determination of any annuity for lives, where such purchase was made, or such lease or annuity granted, for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee.

Exception  
for transac-  
tions for  
money con-  
sideration.

(2.) Where any such purchase was made, or lease or annuity granted, for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee, the value of the

<sup>1</sup> Appendix xvii.<sup>2</sup> Appendix xviii.

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XXII.

Aggregation of property to form one estate for purpose of duty.

Amended by Act of 1900, § 12 (1).

consideration shall be allowed as a deduction from the value of the property for the purpose of Estate duty.

4. For determining the rate of Estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which Estate duty is leviable shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof :

Provided that any property so passing, in which the deceased never had an interest, or which under a disposition not made by the deceased passes immediately on the death of the deceased to some person other than the wife or husband or a lineal ancestor or lineal descendant of the deceased, shall not be aggregated with any other property but shall be an estate by itself, and the Estate duty shall be levied at the proper graduated rate on the principal value thereof ; but if any benefit under a disposition not made by the deceased is reserved or given to the wife or husband or a lineal ancestor or lineal descendant of the deceased, such benefit shall be aggregated with property of the deceased for the purpose of determining the rate of Estate duty.

Settled property.

5.—(1.) Where property in respect of which Estate duty is leviable, is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property,—

(See Act of 1896, § 19.)

(a.) a further Estate duty (called settlement Estate duty) on the principal value of the settled property shall be levied at the rate herein-after specified, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased ; but

(b.) during the continuance of the settlement the settlement Estate duty shall not be payable more than once.

Amended by Act of 1898, §§ 13 and 14.

(2.) If Estate duty has already been paid in respect of any settled property since the date of the settlement, the Estate duty shall not, nor shall any of the duties mentioned in the fifth paragraph of the First Schedule to this Act, be payable in respect thereof, until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property.

(3.) In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death.

(4.) Any person paying the settlement Estate duty payable under this section upon property comprised in a settlement, may deduct the amount of the *ad valorem* stamp duty (if any) charged on the settlement in respect of that property.

(5.) Where any lands or chattels are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession thereof is capable of alienating the same, whether his interest

is in law a tenancy for life or a tenancy in tail, the provisions of this Act with respect to settled property shall not apply, and the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued, for the purpose of Estate duty, in like manner as for the purpose of succession duty.

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*Collection and Recovery of Duty and Value of Property.*

6.—(1.) Estate duty shall be a stamp duty, collected and recovered as herein-after mentioned.

Collection  
and re-  
covery of  
Estate duty.

(2.) The executor of the deceased shall pay the Estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death, on delivering the Inland Revenue affidavit, and may pay in like manner the Estate duty in respect of any other property passing on such death, which by virtue of any testamentary disposition of the deceased is under the control of the executor, or, in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment.

(3.) Where the executor does not know the amount or value of any property which has passed on the death, he may state in the Inland Revenue affidavit that such property exists but he does not know the amount or value thereof, and that he undertakes, as soon as the amount and value are ascertained, to bring in an account thereof, and to pay both the duty for which he is or may be liable, and any further duty payable by reason thereof for which he is or may be liable in respect of the other property mentioned in the affidavit.

(4.) Estate duty, so far as not paid by the executor, shall be collected upon an account setting forth the particulars of the property, and delivered to the commissioners within six months after the death by the person accountable for the duty, or within such further time as the Commissioners may allow.

(5.) Every estate shall include all income accrued upon the property included therein down to and outstanding at the date of the death of the deceased.

(6.) Interest at the rate of three per cent. per annum on the estate duty shall be paid from the date of the death up to the date of the delivery of the Inland Revenue affidavit or account, or the expiration of six months after the death, whichever first happens, and shall form part of the estate duty. (See Act of 1898, § 13. Act of 1900, § 13.)

(7.) The duty which is to be collected upon an Inland Revenue affidavit or account shall be due on the delivery thereof or on the expiration of six months from the death, whichever first happens.

(8.) Provided that the duty due upon an account of real property may, at the option of the person delivering the account, be paid by eight equal yearly instalments, or sixteen half-yearly instalments, with interest at the rate of three per cent. per annum from the date at which the first instalment is due, less income tax, and the first instalment shall be due at the

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expiration of twelve months from the death, and the interest on the unpaid portion of the duty shall be added to each instalment and paid accordingly ; but the duty for the time being unpaid, with such interest to the date of payment, may be paid at any time, and in case the property is sold, shall be paid on completion of the sale, and if not so paid shall be duty in arrear.

Value of  
property.

7.—(1.) In determining the value of an estate for the purpose of Estate duty, allowance shall be made for reasonable funeral expenses and for debts and incumbrances ; but an allowance shall not be made—

- (a.) for debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bonâ fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest, nor
- (b.) for any debt in respect whereof there is a right to reimbursement from any other estate or person, unless such reimbursement cannot be obtained, nor
- (c.) more than once for the same debt or incumbrance charged upon different portions of the estate ;

and any debt or incumbrance for which an allowance is made shall be deducted from the value of the land or other subjects of property liable thereto.

(2.) An allowance shall not be made in the first instance for debts due from the deceased to persons resident out of the United Kingdom (unless contracted to be paid in the United Kingdom, or charged on property situate within the United Kingdom), except out of the value of any personal property of the deceased situate out of the United Kingdom in respect of which Estate duty is paid ; and there shall be no repayment of Estate duty in respect of any such debts, except to the extent to which it is shown to the satisfaction of the Commissioners, that the personal property of the deceased situate in the foreign country or British Possession in which the person to whom such debts are due resides, is insufficient for their payment.

(3.) Where the Commissioners are satisfied that any additional expense, in administering or in realising property has been incurred by reason of the property being situate out of the United Kingdom, they may make an allowance from the value of the property on account of such expense, not exceeding in any case five per cent. on the value of the property.

(4.) Where any property passing on the death of the deceased is situate in a foreign country, and the Commissioners are satisfied that by reason of such death any duty is payable in that foreign country in respect of that property, they shall make an allowance of the amount of that duty from the value of the property.

(5.) The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased :

Provided that, in the case of any agricultural property, where no part

of the principal value is due to the expectation of an increased income from such property, the principal value shall not exceed twenty-five times the annual value as assessed under Schedule A of the Income Tax Act, after making such deductions as have not been allowed in that assessment and are allowed under the Succession Duty Act, 1853, and making a deduction for expenses of management not exceeding five per cent. of the annual value so assessed. 16 and 17  
Vict. c. 51.

(6.) Where an estate includes an interest in expectancy, Estate duty in respect of that interest shall be paid, at the option of the person accountable for the duty, either with the duty in respect of the rest of the estate or when the interest falls into possession, and if the duty is not paid with the Estate duty in respect of the rest of the estate, then—

- (a.) for the purpose of determining the rate of Estate duty in respect of the rest of the estate, the value of the interest shall be its value at the date of the death of the deceased ; and
- (b.) the rate of Estate duty in respect of the interest when it falls into possession shall be calculated according to its value when it falls into possession, together with the value of the rest of the estate as previously ascertained.

(7.) The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall—

- (a.) if the interest extended to the whole income of the property, be the principal value of that property ; and
- (b.) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended.

(8.) Subject to the provisions of this Act, the value of any property for the purpose of Estate duty shall be ascertained by the Commissioners in such manner and by such means as they think fit, and if they authorise a person to inspect any property and report to them the value thereof for the purposes of this Act the person having the custody or possession of that property shall permit the person so authorised to inspect it at such reasonable times as the Commissioners consider necessary.

(9.) Where the Commissioners require a valuation to be made by a person named by them, the reasonable costs of such valuation shall be defrayed by the Commissioners.

(10.) Property passing on any death shall not be aggregated more than once, nor shall Estate duty in respect thereof be more than once levied on the same death.

8.—(1.) The existing law and practice relating to any of the duties now leviable on or with reference to death shall, subject to the provisions of this Act and so far as the same are applicable, apply for the purposes of the collection, recovery, and repayment of Estate duty, and for the exemption of the property of common seamen, marines, or soldiers who are slain or die in the service of Her Majesty, and for the purpose of payment of sums under one hundred pounds without requiring representation, Supple-  
mental pro-  
visions as to  
collection,  
recovery,  
and repay-  
ment of and  
exemption  
from Estate  
duty.

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as if such law and practice were in terms made applicable to this Part of this Act.

(2.) Sections twelve to fourteen of the Customs and Inland Revenue Act, 1889, and section forty-seven of the Local Registration of Title (Ireland) Act, 1891, shall apply as if Estate duty were therein mentioned as well as succession duty, and as if an account were not settled within the meaning of any of the above sections until the time for the payment of the duty on such account has arrived.

(3.) The executor of the deceased shall, to the best of his knowledge and belief, specify in appropriate accounts annexed to the Inland Revenue affidavit all the property in respect of which Estate duty is payable upon the death of the deceased, and shall be accountable for the Estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death, but shall not be liable for any duty in excess of the assets which he has received as executor, or might but for his own neglect or default have received.

(4.) Where property passes on the death of the deceased, and his executor is not accountable for the Estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title, shall be accountable for the Estate duty on the property, and shall, within the time required by this Act or such later time as the Commissioners allow, deliver to the Commissioners and verify an account, to the best of his knowledge and belief, of the property: Provided that nothing in this section contained shall render a person accountable for duty who acts merely as agent or bailiff for another person in the management of property.

(5.) Every person accountable for Estate duty, and every person whom the Commissioners believe to have taken possession of or administered any part of the estate in respect of which duty is leviable on the death of the deceased, or of the income of any part of such estate, shall, to the best of his knowledge and belief, if required by the Commissioners, deliver to them and verify a statement of such particulars, together with such evidence as they require, relating to any property which they have reason to believe to form part of an estate in respect of which Estate duty is leviable on the death of the deceased.

(6.) A person who wilfully fails to comply with any of the foregoing provisions of this section shall be liable to pay one hundred pounds, or a sum equal to double the amount of the Estate duty, if any, remaining unpaid for which he is accountable, according as the Commissioners elect: Provided that the Commissioners, or in any proceeding for the recovery of such penalty the Court, shall have power to reduce any such penalty.

(7.) Estate duty shall, in the first instance, be calculated at the appropriate rate according to the value of the estate as set forth in the Inland

Revenue affidavit or account delivered, but if afterwards it appears that for any reason too little duty has been paid, the additional duty shall, unless a certificate of discharge has been delivered under this Act, be payable, and be treated as duty in arrear.

(8.) The Commissioners on application from a person accountable for the duty on any property forming part of an estate shall, where they consider that it can conveniently be done, certify the amount of the valuation accepted by them for any class or description of property forming part of such estate.

(9.) Where the Commissioners are satisfied that the Estate duty leviable in respect of any property cannot without excessive sacrifice be raised at once, they may allow payment to be postponed for such period, to such extent, and on payment of such interest not exceeding four per cent. or any higher interest yielded by the property, and on such terms, as the Commissioners think fit.

(10.) Interest on arrears of Estate duty shall be paid as if they were arrears of legacy duty. (See Act of 1896, §§ 18 and 40.)

(11.) If after the expiration of twenty years from a death upon which Estate duty became leviable any such duty remains unpaid, the Commissioners may, if they think fit, on the application of any person accountable or liable for such duty or interested in the property, remit the payment of such duty or any part thereof or any interest thereon.

(12.) Where it is proved to the satisfaction of the Commissioners that too much Estate duty has been paid, the excess shall be repaid by them and in cases where the over-payment was due to over-valuation by the Commissioners, with interest at three per cent. per annum.

(13.) Where any proceeding for the recovery of Estate duty in respect of any property is instituted, the High Court shall have jurisdiction to appoint a receiver of the property and the rents and profits thereof, and to order a sale of the property.

(14.) All affidavits, accounts, certificates, statements, and forms used for the purpose of this Part of this Act shall be in such form, and contain such particulars, as may be prescribed, and if so required by the Commissioners shall be in duplicate, and accounts and statements shall be delivered and verified on oath and by production of books and documents in the manner prescribed, and any person who wilfully fails to comply with the provisions of this enactment shall be liable to the penalty above in this section mentioned.

(15.) No charge shall be made for any certificate given by the Commissioners under this Act.

(16.) The Estate duty may be collected by means of stamps or such other means as the Commissioners prescribe.

(17.) The form of certificate required to be given by the proper officer of the Court under section thirty of the Customs and Inland Revenue Act, 1881, may be varied by a rule of court in such manner as may appear necessary for carrying into effect this Act. 44 and 45 Vict. c. 12.

(18.) Nothing in this section shall render liable to or accountable

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Charge of  
Estate duty  
on property,  
and facilities  
for raising it.

for duty a *bond fide* purchaser for valuable consideration without notice.

9.—(1.) A rateable part of the Estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable: Provided that the property shall not be so chargeable as against a *bond fide* purchaser thereof for valuable consideration without notice.

(2.) On an application submitting in the prescribed form the description of the lands or other subjects of property (whether hereditaments, stocks, funds, shares, or securities), and of the debts and incumbrances allowed by the Commissioners in assessing the value of the property for the purposes of Estate duty, the Commissioners shall grant a certificate of the Estate duty paid in respect of the property, and specify the debts and incumbrances so allowed, as well as the lands or other subjects of property.

(3.) Subject to any repayment of Estate duty arising from want of title to the land or other subjects of property, or from the existence of any debt or incumbrance thereon for which under this Act an allowance ought to have been but has not been made, or from any other cause, the certificate of the Commissioners shall be conclusive evidence that the amount of duty named therein is a first charge on the lands or other subjects of property after the debts and incumbrances allowed as aforesaid: Provided that any such repayment of duty by the Commissioners shall be made to the person producing to them the said certificate.

(4.) If the rateable part of the Estate duty in respect of any property is paid by the executor, it shall, where occasion requires, be repaid to him by the trustees or owners of the property, but if the duty is in respect of real property, it may, unless otherwise agreed upon, be repaid by the same instalments and with the same interest as are in this Act mentioned.

(5.) A person authorised or required to pay the Estate duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on that property or any part thereof.

(6.) A person having a limited interest in any property, who pays the Estate duty in respect of that property, shall be entitled to the like charge as if the Estate duty in respect of that property had been raised by means of a mortgage to him.

(7.) Any money arising from the sale of property comprised in a settlement, or held upon trust to lay out upon the trusts of a settlement, and capital money arising under the Settled Land Act, 1882, may be expended in paying any Estate duty in respect of property comprised in the settlement and held upon the same trusts.

10.—(1.) Any person aggrieved by the decision of the Commissioners with respect to the repayment of any excess of duty paid, or by the amount

45 and 46  
Vict. c. 38.

Appeal from  
Commissioners.

of duty claimed by the Commissioners, whether on the ground of the value of any property or the rate charged or otherwise, may, on payment of, or giving security as hereinafter mentioned for, the duty claimed by the Commissioners or such portion of it as is then payable by him, appeal to the High Court within the time and in the manner and on the conditions directed by rules of Court, and the amount of duty shall be determined by the High Court, and if the duty as determined is less than that paid to the Commissioners, the excess shall be repaid.

(2.) No appeal shall be allowed from any order, direction, determination, or decision of the High Court in any appeal under this section except with the leave of the High Court or Court of Appeal.

(3.) The costs of the appeal shall be in the discretion of the Court, and the Court, where it appears to the Court just, may order the Commissioners to pay on any excess of duty repaid by them interest at the rate of three per cent. per annum for such period as appears to the Court just.

(4.) Provided that the High Court, if satisfied that it would impose hardship to require the appellant, as a condition of an appeal, to pay the whole or, as the case may be, any part of the duty claimed by the Commissioners or of such portion of it as is then payable by him, may allow an appeal to be brought on payment of no duty, or of such part only of the duty as to the Court seems reasonable, and on security to the satisfaction of the Court being given for the duty, or so much of the duty as is not so paid, but in such case the Court may order interest at the rate of three per cent. per annum to be paid on the unpaid duty so far as it becomes payable under the decision of the Court.

(5.) Where the value, as alleged by the Commissioners, of the property in respect of which the dispute arises does not exceed ten thousand pounds, the appeal under this section may be to the county court for the county or place in which the appellant resides or the property is situate, and this section shall for the purpose of the appeal apply as if such county court were the High Court. (See Act of 1896, § 22.)

(6.) The county council of every county or county borough in Great Britain shall within twelve months after the commencement of this Act, and may thereafter from time to time, appoint a sufficient number of qualified persons to act as valuers for the purposes of this Act in their respective counties, and shall fix a scale of charges for the remuneration of such persons, and the Court may refer any question of disputed value under this section to the arbitration of any person so appointed for the county in which the appellant resides or the property is situate; and the costs of any such arbitration shall be part of the costs of the appeal.

#### *Discharge from and Apportionment of Duty.*

11.—(1.) The Commissioners, on being satisfied that the full Estate duty has been or will be paid in respect of an estate or any part thereof, shall, if required by the person accounting for the duty, give a certificate to that effect, which shall discharge from any further claim for Estate Release of persons paying Estate duty.

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duty the property shown by the certificate to form the estate or part thereof, as the case may be.

(2.) Where a person accountable for the Estate duty in respect of any property passing on a death applies after the lapse of two years from such death to the Commissioners, and delivers to them and verifies a full statement to the best of his knowledge and belief of all property passing on such death and the several persons entitled thereto, the Commissioners may determine the rate of the Estate duty in respect of the property for which the applicant is accountable, and on payment of the duty at that rate, that property and the applicants so far as regards that property shall be discharged from any further claim for Estate duty, and the Commissioners shall give a certificate of such discharge.

(3.) A certificate of the Commissioners under this section shall not discharge any person or property from Estate duty in case of fraud or failure to disclose material facts, and shall not affect the rate of duty payable in respect of any property afterwards shown to have passed on the death, and the duty in respect of such property shall be at such rate as would be payable if the value thereof were added to the value of the property in respect of which duty has been already accounted for :

(4.) Provided nevertheless that a certificate purporting to be a discharge of the whole Estate duty payable in respect of any property included in the certificate, shall exonerate a *bond fide* purchaser for valuable consideration without notice, from the duty notwithstanding any such fraud or failure.

Commutation of duty on interest in expectancy.

12. The Commissioners in their discretion, upon application by a person entitled to an interest in expectancy, may commute the Estate duty which would or might, but for the commutation, become payable in respect of such interest for a certain sum to be presently paid, and for determining that sum shall cause a present value to be set upon such duty, regard being had to the contingencies affecting the liability to and rate and amount of such duty, and interest being reckoned at three per cent. ; and on the receipt of such sum they shall give a certificate of discharge accordingly.

Powers to accept composition for death duties.

13.—(1.) Where, by reason of the number of deaths on which property has passed, or of the complicated nature of the interests of different persons in property which has passed on death, or from any other cause, it is difficult to ascertain exactly the amount of death duties or any of them payable in respect of any property or any interest therein, or so to ascertain the same without undue expense in proportion to the value of the property or interest, the Commissioners, on the application of any person accountable for any duty thereon, and upon his giving to them all the information in his power respecting the amount of the property and the several interests therein, and other circumstances of the case, may by way of composition for all or any of the death duties payable in respect of the property, or interest, and the various interests therein, or any of them, assess such sum on the value of the property, or interest, as having regard to the circumstances appears proper, and may accept payment of

the sum so assessed in full discharge of all claims for death duties in respect of such property or interest, and shall give a certificate of discharge accordingly :

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(2.) Provided that the certificate shall not discharge any person from any duty in case of fraud or failure to disclose material facts.

(3.) In this section the expression "death duties" means the Estate duty under this Act, the duties mentioned in the First Schedule to this Act and the legacy and succession duties, and the duty payable on any representation or inventory under any Act in force before the Customs and Inland Revenue Act, 1881. (See Act of 1890, § 18 (2).)  
44 and 45  
Vict. c. 12.

14.—(1.) In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the Estate duty may be recovered by the person who, being authorised or required to pay the Estate duty in respect of any property, has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise), under a disposition not containing any express provision to the contrary. Appor-  
tion-  
ment of  
duty.

(2.) Any dispute as to the proportion of Estate duty to be borne by any property or person, may be determined upon application by any person interested in manner directed by rules of Court, either by the High Court, or, where the amount in dispute is less than fifty pounds, by a county court for the county or place in which the person recovering the same resides, or the property in respect of which the duty is paid is situate.

(3.) Any person from whom a rateable part of Estate duty can be recovered under this section, shall be bound by the accounts and valuations as settled between the person entitled to recover the same and the Commissioners.

15.—(1.) Estate duty shall not be payable in respect of a single annuity not exceeding twenty-five pounds purchased or provided by the deceased, either by himself alone or in concert or arrangement with any other person, for the life of himself and of some other person and the survivor of them, or to arise on his own death in favour of some other person ; and if in any case there is more than one such annuity, the annuity first granted shall be alone entitled to the exemption under this section. Exem-  
ptions from  
Estate  
duty.

(2.) It shall be lawful for the Treasury to remit the Estate duty, or any other duty leviable on or with reference to death, in respect of any such pictures, prints, books, manuscripts, works of art or scientific collections, as appear to the Treasury to be of national, scientific, or historic interest, and to be given or bequeathed for national purposes, or to any university, or to any county council or municipal corporation, and no property the duty in respect of which is so remitted shall be aggregated with any other property for the purpose of fixing the rate of Estate duty. (See Act of  
1896, § 20.)

(3.) Estate duty shall not be payable in respect of any pension or annuity payable by the Government of British India to the widow or child of any deceased officer of such Government, notwithstanding that the deceased contributed during his lifetime to any fund out of which such pension or annuity is paid.

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XXII.16 and 17  
Vict. c. 51.

(4.) Estate duty shall not be payable in respect of any advowson or church patronage which would have been free from succession duty under section twenty-four of the Succession Duty Act, 1853.

*Small Estates.*Provision  
for estates  
not exceed-  
ing £1000.  
44 and 45  
Vict. c. 12.

16.—(1.) The provisions of sections thirty-three,<sup>1</sup> thirty-five, and thirty-six of the Customs and Inland Revenue Act, 1881<sup>2</sup> (relating to the obtaining of representation to the deceased where the gross value of his personal estate does not exceed three hundred pounds), shall apply with the necessary modifications to the case where the gross value of the property real and personal in respect of which Estate duty is payable on the death of the deceased, exclusive of property settled otherwise than by the will of the deceased, does not exceed five hundred pounds, and where the gross value does not exceed three hundred pounds the fixed duty shall be thirty shillings, and where the gross value exceeds three hundred pounds and does not exceed five hundred pounds the fixed duty shall be fifty shillings.

(2.) All such property may be comprised in the notice under the said section thirty-three.

(3.) Where the net value of the property, real and personal, in respect of which Estate duty is payable on the death of the deceased, exclusive of property settled otherwise than by the will of the deceased, does not exceed one thousand pounds, such property, for the purpose of Estate duty, shall not be aggregated with any other property, but shall form an estate by itself; and where the fixed duty or Estate duty has been paid upon the principal value of that estate, the settlement Estate duty and the legacy and succession duties shall not be payable under the will or intestacy of the deceased in respect of that estate.

(4.) Where representation granted under this section, if granted in England extends to property in Ireland, and if granted in Ireland extends to property in England, the principal registrar of the Probate Division of the High Court in England or Ireland, as the case may be, shall affix the seal of the Court thereto on the same being sent to him for that purpose, with the fee of two shillings and sixpence.

(5.) Where the fixed duty of thirty or fifty shillings is paid within twelve months after the death of the deceased, interest on such duty shall not be payable.

*Rates of Estate Duty.*

17. The rates of Estate duty shall be according to the following scale :—

<sup>1</sup> In application to Scotland (§ 23 (7) of this Act) section “thirty-four” to be substituted for section “thirty-three.”

<sup>2</sup> Appendix xvii.

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rates of  
Estate duty.

Where the Principal Value of the Estate			Estate Duty shall be payable at the Rate per cent. of
	£	£	
Exceeds	100 and does not exceed.	500	One pound.
"	500	" "	Two pounds.
"	1,000	" "	Three pounds.
"	10,000	" "	Four pounds.
"	25,000	" "	Four pounds ten shillings.
"	50,000	" "	Five pounds.
"	75,000	" "	Five pounds ten shillings.
"	100,000	" "	Six pounds.
"	150,000	" "	Six pounds ten shillings.
"	250,000	" "	Seven pounds.
"	500,000	" "	Seven pounds ten shillings.
"	1,000,000	" "	Eight pounds.

The rate of the settlement Estate duty where the property is settled shall be one per cent. :

Provided that for any fractional part of ten pounds over ten pounds or any multiple thereof, the Estate duty and the settlement Estate duty shall be payable at the rate per cent. for the full sum of ten pounds. (See Act of 1896, § 17. Act of 1900, § 13.)

*Succession Duty.*

18.—(1.) The value for the purpose of succession duty of a succession to real property arising on the death of a deceased person shall, where the successor is competent to dispose of the property, be the principal value of the property, after deducting the Estate duty payable in respect thereof on the said death, and the expenses, if any, properly incurred, of raising and paying the same ; and the duty shall be a charge on the property, and shall be payable by the same instalments as are authorised by this Act for Estate duty on real property, with interest at the rate of three per cent. per annum ; and the first instalment shall be payable and the interest shall begin to run at the expiration of twelve months after the date on which the successor became entitled in possession to his succession or to the receipt of the income and profit thereof ; and after the expiration of the said twelve months the provisions with respect to discount shall not apply. Value of real successions for succession duty.

(2.) The principal value of real property for the purpose of succession duty shall be ascertained in the same manner as it would be ascertained under the provisions of this Act for the purpose of Estate duty ; and in the case of any agricultural property where no part of the principal value is due to the expectation of an increased income from such property, the annual value for the purpose of succession duty shall be arrived at in the same manner as under the provisions of this Part of this Act for the purpose of Estate duty.

APPENDIX  
XXII.

Adaptation  
of law as to  
probate  
duty grant.  
51 and 52  
Vict. cc. 41  
and 60.  
52 and 58  
Vict. c. 50.

44 and 45  
Vict. c. 12.

*Local Taxation Grant.*

19. In substitution for the grant out of the probate duties under the Local Government Act, 1888, the Probate Duty (Scotland and Ireland) Act, 1888, and the Local Government (Scotland) Act, 1889, there shall be paid, out of the proceeds of the Estate duty derived from personal property, such sum as the Commissioners, in accordance with regulations made by the Treasury under those Acts, may determine to be an amount equal to one and a half per cent. on the net value of such of the property in respect of which Estate duty is leviable as would, if this Act had not been passed, have been chargeable with the duty imposed by section twenty-seven of the Customs and Inland Revenue Act, 1881, on Inland Revenue affidavits, and the first-mentioned Acts shall apply, as if the sum so determined were the probate duty grant or one half of the proceeds of the sums collected in respect of the probate duties (as the case requires) within the meaning of those Acts.

*British Possessions.*

Exception  
as to pro-  
perty in  
British  
possessions.

20.—(1.) Where the Commissioners are satisfied that in a British possession to which this section applies, duty is payable by reason of a death in respect of any property situate in such possession and passing on such death, they shall allow a sum equal to the amount of that duty to be deducted from the Estate duty payable in respect of that property on the same death.

(2.) Nothing in this Act shall be held to create a charge for Estate duty on any property situate in a British possession, while so situate, or to authorise the Commissioners to take any proceedings in a British possession for the recovery of any Estate duty.

(3.) Her Majesty the Queen may, by Order in Council, apply this section to any British possession, where Her Majesty is satisfied that, by the law of such possession, either no duty is leviable in respect of property situate in the United Kingdom when passing on death, or that the law of such possession as respects any duty so leviable is to the like effect as the foregoing provisions of this section.

(4.) Her Majesty in Council may revoke any such Order, where it appears that the law of the British possession has been so altered that it would not authorise the making of an Order under this section.

*Savings and Definitions.*

Savings.

21.—(1.) Estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this Part of this Act, in respect of which property any duty mentioned in paragraphs one and two of the First Schedule to this Act, or the duty payable on any representation or inventory under any Act in force before the Customs and Inland Revenue Act, 1881, has been paid or is payable, unless in either case the

44 and 45  
Vict. c. 12.

deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property.

(2.) Where a person died before the commencement of this Part of this Act, the duties mentioned in the First Schedule to this Act shall continue to be payable in like manner in all respects as if this Act had not passed.

(3.) Where an interest in expectancy in any property has, before the commencement of this Part of this Act, been *bona-fide* sold or mortgaged for full consideration in money or money's worth, then no other duty on such property shall be payable by the purchaser or mortgagee when the interest falls into possession, than would have been payable if this Act had not passed; and in the case of a mortgage, any higher duty payable by the mortgagor shall rank as a charge subsequent to that of the mortgagee.

(4.) The settlement Estate duty of one per cent. shall not be payable in respect of property settled by a disposition which has taken effect before the commencement of this Part of this Act.

(5.) Where a husband or wife is entitled, either solely or jointly with the other, to the income of any property settled by the other under a disposition which has taken effect before the commencement of this Part of this Act, and on his or her death the survivor becomes entitled to the income of the property settled by such survivor, Estate duty shall not be payable in respect of that property until the death of the survivor.

22.—(1.) In this Part of this Act, unless the context otherwise Definitions.  
requires:—

- (a.) The expressions "deceased person" and "the deceased" mean a person dying after the commencement of this Part of this Act:
- (b.) The expression "will" includes any testamentary instrument:
- (c.) The expression "representation" means probate of a will or letters of administration:
- (d.) The expression "executor" means the executor or administrator of a deceased person, and includes, as regards any obligation under this Part of this Act, any person who takes possession of or intermeddles with the personal property of a deceased person:
- (e.) The expression "Estate duty" means Estate duty under this Act:
- (f.) The expression "property" includes real property and personal property and the proceeds of sale thereof respectively, and any money or investment for the time being representing the proceeds of sale:
- (g.) The expression "agricultural property" means agricultural land pasture and woodland, and also includes such cottages, farm buildings, farm houses, and mansion houses (together with the lands occupied therewith) as are of a character appropriate to the property:
- (h.) The expression "settled property" means property comprised in a settlement:

APPENDIX  
XXII.45 and 46  
Vict. c. 38.

- (i.) The expression "settlement" means any instrument, whether relating to real property or personal property, which is a settlement within the meaning of section two of the Settled Land Act, 1882,<sup>1</sup> or if it related to real property would be a settlement within the meaning of that section, and includes a settlement effected by a parol trust :
- (j.) The expression "interest in expectancy" includes an estate in remainder or reversion and every other future interest, whether vested or contingent, but does not include reversions expectant upon the determination of leases :
- (k.) The expression "incumbrances" includes mortgages and terminable charges :
- (l.) The expression "property passing on the death" includes property passing either immediately on the death or after any interval either certainly or contingently, and either originally or by way of substitutive limitation, and the expression "on the death" includes "at a period ascertainable only by reference to the death" :
- (m.) The expression "the Commissioners" means the Commissioners of Inland Revenue :
- (n.) The expression "Inland Revenue affidavit" means an affidavit made under the enactments specified in the Second Schedule to this Act with the account and schedule annexed thereto :
- (o.) The expression "prescribed" means prescribed by the Commissioners.
- (2.) For the purposes of this Part of this Act—
- (a.) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property, including a tenant in tail whether in possession or not ; and the expression "general power" includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exerciseable by instrument *inter vivos* or by will, or both, but exclusive of any power exerciseable in a fiduciary capacity under a disposition not made by himself, or exerciseable as tenant for life under the Settled Land Act, 1882, or as mortgagee :
- (b.) A disposition taking effect out of the interest of the deceased person shall be deemed to have been made by him, whether the concurrence of any other person was or was not required :

45 and 46  
Vict. c. 38.

<sup>1</sup> The following is Section 2 (1) of the Act referred to :—Any deed, will, agreement for a settlement or other agreement, covenant to surrender, copy of Court Roll, Act of Parliament, or other instrument or any number of instruments, whether made or passed before or after, or partly before and partly after the commencement of this Act, under or by virtue of which instrument or instruments any land or any estate or interest in land stands for the time being limited to or in trust for any persons by way of succession, creates or is for the purposes of this Act a settlement, and is in this Act referred to as a settlement or as the settlement, as the case requires.

(a.) Money which a person has a general power to charge on property shall be deemed to be property of which he has power to dispose.

APPENDIX  
XXII.

(3.) This Part of this Act shall apply to property in which the wife or husband of the deceased takes an estate in dower or by the courtesy or any other like estate, in like manner as it applies to property settled by the will of the deceased.

*Application to Scotland.*

23. In the application of this Part of this Act to Scotland, unless the context otherwise requires :—

Application of Part of Act to Scotland.

- (1.) The Court of Session shall be substituted for the High Court :
- (2.) "Sheriff court" shall be substituted for "county court" :
- (3.) "Confirmation" shall be substituted for "representation" :
- (4.) The expression "receiver of the property and of the rents and profits thereof" means a judicial factor upon the property :
- (5.) The expression "Inland Revenue affidavit" means the inventory of the personal estate of a deceased now required by law, and includes an additional inventory :
- (6.) The expression "on delivering the Inland Revenue affidavit" means on exhibiting and recording a duly stamped inventory as provided by section thirty-eight of the Act of the forty-eighth year of the reign of King George the Third, chapter one hundred and forty-nine :
- (7.) Section thirty-four of the Customs and Inland Revenue Act, 1881, shall be substituted for section thirty-three of that Act, and the Acts referred to in such section thirty-four shall extend to an estate of a gross value not exceeding five hundred pounds, and an application under the said Acts may be made to any commissary clerk, and any commissary clerk shall affix the seal of the Court to any representation granted in England or Ireland upon the same being sent to him for that purpose, enclosing a fee of two shillings and sixpence : 44 and 45  
Vict. c. 12.
- (8.) The expression "personal property" means moveable property :
- (9.) The expression "real property" includes heritable property :
- (10.) The expression "incumbrance" includes any heritable security or other debt or payment secured upon heritage :
- (11.) The expression "executor" means every person who, as executor, nearest of kin, or creditor, or otherwise, intromits with or enters upon the possession or management of any personal property of a deceased person :
- (12.) The property comprised in any special assignation or disposition taking effect on death shall be deemed to pass on death within the meaning of this Act :
- (13.) The expression "trustee" includes a tutor, curator, and judicial factor :
- (14.) The expression "settled property" shall not include property held under entail :

APPENDIX  
XXII.(See Act 1896,  
§ 28.)

- (15.) An institute or heir of entail in possession of an entailed estate shall whether *sui juris* or not, be deemed for the purposes of this Act to be a person competent to dispose of such estate :
- (16.) Where an entailed estate passes on the death of the deceased to an institute or heir of entail, who is not entitled to disentail such estate without either obtaining the consent of one or more subsequent heirs of entail or having the consent of such one or more subsequent heirs valued and dispensed with, settlement Estate duty as well as Estate duty shall be paid in respect of such estate, but neither Estate duty nor settlement Estate duty shall be payable again in respect of such estate, until such estate is disentailed, or until an heir of entail to whom it passes on or subsequent to the death of the institute or heir first mentioned, and who is entitled to disentail it without obtaining the consent of any subsequent heir or heirs or having the consent of any subsequent heir or heirs valued and dispensed with, dies :
- (17.) Where an institute or heir of entail in possession of an entailed estate, who is not entitled to disentail such estate without either obtaining the consent of one or more subsequent heirs of entail or having the consent of such one or more subsequent heirs valued and dispensed with, has paid Estate duty in respect of such estate, and afterwards disentailed such estate, he shall be entitled to deduct from the value in money of the expectancy or interest in such estate of such one or more subsequent heirs, payable by him to them in respect of their consents having been granted or dispensed with, a proper rateable part of the Estate duty paid by him as aforesaid :
- (18.) Where any person who pays Estate duty on any property, and in whom the property is not vested, is by this Act authorised to raise such duty by the sale or mortgage of that property, or any part thereof, it shall be competent for such person to apply to the Court of Session—
- (a.) for an order of sale of the property or part of it, and in the event of the Court granting such an order, it shall provide for the payment out of the price of the amount of the Estate duty which has been paid by such person, and the Court shall thereafter make such order as to the disposal of the surplus, if any, of the price, by way of investment or otherwise, as to the Court shall seem proper ; the Court may in such order specify the time and place at which, the person by whom, and the advertisement or notice after which the sale shall be made, and may ordain the person in whom the property is vested to grant a disposition thereof in favour of the purchaser, and if the person in whom the property is vested refuses or fails to do so, the Court shall grant authority to the clerk of Court to execute such disposition, and such disposition so executed shall be as valid as if it had been executed by the person in whom the property is vested : or

- (b.) for an order ordaining the person in whom the property is vested to grant a bond and disposition in security over the property in favour of the person who has paid the Estate duty, for the amount of the said duty, and if the person in whom the property is vested refuses or fails to do so, the Court shall grant authority to the clerk of Court to execute such a bond and disposition in security, and such bond and disposition in security so executed shall be as valid as if it had been executed by the person in whom the property is vested, and shall be a first charge upon the property after any debt or incumbrance for which an allowance is directed to be made under this Act in determining the value of the property for the purpose of Estate duty:

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Provided also that summary diligence shall not be competent thereupon, and that nothing herein contained shall make the duty to be recovered by the methods of these sub-sections (a) and (b) recoverable at any earlier time than if it had been recovered by direct action against the person ultimately liable for the duty:

- (19.) This Part of this Act shall apply to property in which the wife or husband of the deceased takes an estate of terce or courtesy or any other like estate in like manner as it applies to property settled by the will of the deceased.

#### *Commencement.*

24. This Part of this Act shall come into operation on the expiration of the first day of August one thousand eight hundred and ninety-four, in this Part of this Act referred to as the commencement of this Part of this Act.

Commence-  
ment of Part  
of Act.

#### *Short Title.*

42. This Act may be cited as the Finance Act, 1894.

Short title.

## SCHEDULES.

### FIRST SCHEDULE.

#### EXISTING DUTIES REFERRED TO.

1. The stamp duties imposed by the Customs and Inland Revenue Act, 1881, on the affidavit to be required and received from the person applying for probate or letters of administration in England or Ireland, or on the inventory to be exhibited and recorded in Scotland.

Sections 1, 5,  
18, 21.44 and 45  
Vict. c. 12.

2. The stamp duties imposed by section 38 of the Customs and Inland Revenue Act, 1881, as amended and extended by section 11 of the Customs and Inland Revenue Act, 1889, on the value of personal or moveable property to be included in accounts thereby directed to be delivered.

52 and 53  
Vict. c. 7.

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XXII.51 and 52  
Vict. c. 8.

3. The additional succession duties imposed by section 21 of the Customs and Inland Revenue Act, 1888.

4. The temporary Estate duties imposed by sections 5 and 6 of the Customs and Inland Revenue Act, 1889.

5. The duty at the rate of one pound per cent. which would by virtue of the Acts in force relating to legacy duty or succession duty have been payable under the will or intestacy of the deceased, or under his disposition or any devolution from him under which respectively Estate duty has been paid, or under any other disposition under which Estate duty has been paid.

## SECOND SCHEDULE.

## ACTS REFERRED TO.

Section 22  
(n).

Session and Chapter.	Title or Short Title.	Section referred to.
55 Geo. III. c. 184 .	The Stamp Act, 1815 . .	Section thirty-eight.
56 Geo. III. c. 56 .	An Act the title of which begins with the words "An Act to repeal the several stamp duties," and ends with the words "managing the said duties"	Section one hundred and seventeen.
43 Vict. c. 14 . .	The Customs and Inland Revenue Act, 1880	Section ten.
44 and 45 Vict. c. 12	The Customs and Inland Revenue Act, 1881	Sections twenty-nine and thirty-two.

## XXIII.—FINANCE ACT, 1896,

59 AND 60 VICT. CAP. 28 (7TH AUGUST 1896).

## PART IV.

## DEATH DUTIES.

## Section

14. Exception to passing of property on enlargement of interest of settlor.

15. Reverter of property to disponent.

16. Estate duty on annuities.

## Section

17. Estate duty on fractions of one hundred pounds.
18. Interest upon Estate duty and other death duties.
19. Incidence of settlement Estate duty.
20. Objects of national, scientific, or historic interest.
21. Allowance of succession duty, etc., paid out of capital before commencement of 57 and 58 Vict. c. 30.
22. Appeal from county court under 57 and 58 Vict. c. 30, § 10.
23. Amendment of 57 and 58 Vict. c. 30, §§ 18, 23, as to certain heirs of entail in Scotland.
24. Commencement and construction of Part of Act.

*Estate duty.*

14. Where property is settled by a person on himself for life, and after his death on any other persons with an ultimate reversion of an absolute interest or absolute power of disposition to the settlor, the property shall not be deemed for the purpose of the principal Act to pass to the settlor on the death of any such other person after the commencement of this Part of this Act, by reason only that the settlor, being then in possession of the property as tenant for life, becomes, in consequence of such death, entitled to the immediate reversion, or acquires an absolute power to dispose of the whole property.

Exception to passing of property on enlargement of interest of settlor.

15.—(1.) Where by a disposition of any property an interest is conferred on any person other than the disposer for the life of such person or determinable on his death, and such person enters into possession of the interest and thenceforward retains possession thereof to the entire exclusion of the disposer or of any benefit to him by contract or otherwise, and the only benefit which the disposer retains in the said property is subject to such life or determinable interest, and no other interest is created by the said disposition, then, on the death of such person after the commencement of this Part of this Act, the property shall not be deemed for the purpose of the principal Act to pass by reason only of its reverting to the disposer in his lifetime.

Reverter of property to disposer.

(2.) Where by a disposition of any property any such interest as above in this section mentioned is conferred on two or more persons, either severally or jointly, or in succession, this section shall apply in like manner as where the interest is conferred on one person :

(3.) Provided that the foregoing sub-sections shall not apply where such person or persons taking the said life or determinable interest had at any time prior to the disposition been himself or themselves competent to dispose of the said property.

(4.) Where the deceased person was entitled by law to the rents and profits of real property (as defined by section one of the Succession Duty Act, 1853) of his wife, and has died in her lifetime, such property shall not be deemed for the purpose of the principal Act to pass on his death by reason of her then becoming entitled to the property in virtue of her former interest.

16 and 17 Vict. c. 51.

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XXIII.Estate  
duty on  
annuities.

16. The Estate duty due in respect of any annuity or other definite annual sum whether terminable or perpetual, referred to in section two (1) (d) of the principal Act, may at the option of the person delivering the account, be paid by four equal yearly instalments, the first of which shall be due at the end of twelve months from the date of the death, and after the end of those twelve months interest on the unpaid portion of the duty shall be added to each instalment and paid accordingly, but the duty for the time being unpaid, with interest to the date of payment, may be paid at any time.

Estate  
duty on  
fractions  
of one  
hundred  
pounds.*Amended by  
Act of 1900,  
§ 18.*

17. Section seventeen of the principal Act shall have effect as if there were added at the end thereof the following proviso in substitution for the existing proviso as to fractional parts of ten pounds :—

Provided that where the principal value of an estate comprises a fraction of one hundred pounds in excess of one hundred pounds or of any multiple of one hundred pounds, such fraction shall be excluded from the value of the estate for the purpose of determining both the rate and the amount of duty, except that where the principal value of the estate exceeds one hundred pounds and does not exceed two hundred pounds the duty shall be one pound.

Interest  
upon Es-  
tate duty  
and other  
death  
duties.

18.—(1.) Simple interest at the rate of three per cent. per annum, without deduction for income tax, shall be payable upon all Estate duty from the date of the death of the deceased, or, where the duty is payable by instalments, or becomes due at any date later than six months after the death from the date at which the first instalment or the duty becomes due, and shall be recoverable in the same manner as if it were part of the duty.

(2.) The foregoing provision shall apply to the interest on all death duties as defined by section thirteen of the principal Act in like manner as if it were herein re-enacted and made applicable to those duties.

(3.) The Commissioners of Inland Revenue may remit the interest on any of such death duties where the amount appears to them to be so small as not to repay the expense and trouble of calculation and account.

Incidence  
of settle-  
ment Es-  
tate duty.

19.—(1.) The settlement Estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contains an express provision to the contrary) be payable out of the settled legacy or property in exoneration of the rest of the deceased's estate.

(2.) The settlement Estate duty leviable in respect of any such legacy or property shall be collected upon an account setting forth the particulars of the legacy or property, and delivered to the Commissioners by the executor within six months after the death, or within such further time as the commissioners may allow.

Objects of  
national,  
scientific,  
or historic  
interest.

20.—(1.) Where any property passing on the death of a deceased person consists of such pictures, prints, books, manuscripts, works of art, scientific collections, or other things not yielding income, as appear to the Treasury to be of national, scientific, or historic interest, and is settled so as to be enjoyed in kind in succession by different persons, such property shall not, on the death of such deceased person, be aggregated with other property, but shall form an estate by itself, and, while enjoyed in kind by a person

not competent to dispose of the same, be exempt from Estate duty, but if it is sold or is in the possession of some person who is then competent to dispose of the same, shall become liable to Estate duty.

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XXIII.

(2.) The person selling the same, or for whose benefit the same is sold, and also the person being in possession and competent to dispose of the same, shall be accountable for the duty, and shall deliver an account, in accordance with section eight of the principal Act, in the case of a sale within one month after the sale, and in the case of a person coming into possession, or if in possession becoming competent to dispose, within six months after he so comes into possession, or becomes competent to dispose.

21. Where on the death of a deceased person Estate duty becomes payable by a person in respect of any property passing under a settlement made by a will or disposition which took effect before the commencement of the principal Act, and before that commencement any duty mentioned in paragraphs three to five of the First Schedule to the principal Act has been paid or is payable under the same will or disposition on the capital value of the property, the Commissioners of Inland Revenue shall allow the duty so paid or payable as a deduction from the Estate duty to the extent to which it has been paid or is payable in respect of the property on which Estate duty is payable.

Allowance of succession duty, &c., paid out of capital before commencement of 57 and 58 Vict. c. 30.

22. There shall be added to sub-section five of section ten of the principal Act the following proviso: Provided that in every such case any party shall have a right of appeal to Her Majesty's Court of Appeal.

Appeal from county court under 57 and 58 Vict. c. 30, § 10.

23. The Finance Act, 1894, shall be construed as if there were added in section twenty-three thereof, after sub-section fifteen, the following enactment:

Amendment of 57 and 58 Vict. c. 30, as to certain heirs of entail in Scotland.

Provided that for the purposes of section eighteen of this Act such institute or heir of entail shall not be deemed to be a person competent to dispose of such estate, unless he is entitled to disentail it without obtaining the consent of any subsequent heir of entail, or having the consent of any subsequent heir valued and dispensed with.

24.—(1.) Unless the context otherwise requires—

(a.) this Part of this Act shall come into operation on the first day of July one thousand eight hundred and ninety-six, which day is in this Part of this Act referred to as the commencement of this Part of this Act; and

Commencement and construction of Part of Act.

(b.) the expression "deceased person" means a person dying after the commencement of this Part of this Act.

(2.) Part I. of the Finance Act, 1894, is in this Act referred to as "the principal Act."

39. Part IV. of this Act shall be construed together with Part I. of the Finance Act, 1894.

57 and 58 Vict. c. 30.

40. The Acts mentioned in the Schedule to this Act are hereby repealed to the extent in the third column of that Schedule mentioned.

Repeal of Acts.

41. This Act may be cited as the Finance Act, 1896.

Short title.

## SCHEDULE.

## ACTS REPEALED—PART III.—DEATH DUTIES.

APPENDIX  
XXIII.

Section 40.

Session and Chapter.	Short Title.	Extent of Appeal.
31 and 32 Vict. c. 124	An Act to amend the laws relating to the Inland Revenue	In section nine, from "at the rate of four pounds," to "as part thereof."
57 and 58 Vict. c. 30	The Finance Act, 1894	Section six, in sub-section six, the words "at the rate of three per cent. per annum," and the words "and shall form part of the Estate duty," and in sub-section eight, the words "less income tax."  Section eight, sub-section ten.  Section seventeen, from "provided that," to the end of the section.

## XXIV.—FINANCE ACT, 1898,

61 AND 62 VICT. CAP. 10 (1ST JULY 1898).

## PART V.—ESTATE DUTIES.

Persons not  
*sui juris* not  
to be deemed  
competent to  
dispose for  
the purpose  
of breaking  
settlements.

13. Section five, sub-section two, of the Finance Act, 1894, shall be read and have effect as if the following words had been inserted at the end thereof, "and who if on his death subsequent limitations under the settlement take effect in respect of such property was *sui juris* at the time of his death or had been *sui juris* at any time while so competent to dispose of the property."

Settlement  
Estate duty  
repayment.

14. Where in the case of a death occurring after the commencement of this Act settlement Estate duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has not arisen, and cannot arise, the said duty paid in respect of such property shall be repaid.

## XXV.—FINANCE ACT, 1900,

63 VICT. CAP. 7 (9TH APRIL 1900).

## PART III.—DEATH DUTIES.

11.—(1.) In the case of every person dying after the thirty-first day of March nineteen hundred, property whether real or personal in which the deceased person or any other person had an estate or interest limited to cease on the death of the deceased shall, for the purpose of the Finance Act, 1894, and the Acts amending that Act, be deemed to pass on the death of the deceased, notwithstanding that that estate or interest has been surrendered, assured, divested, or otherwise disposed of, whether for value or not, to or for the benefit of any person entitled to an estate or interest in remainder or reversion in such property, unless that surrender, assurance, divesting, or disposition, was *bond fide* made or effected twelve months before the death of the deceased, and *bond fide* possession and enjoyment of the property was assumed thereunder immediately upon the surrender, assurance, divesting, or disposition, and thenceforward retained to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, and of any benefit to him by contract or otherwise.

Amendment  
of 57 and 58  
Vict. c. 30  
as to pro-  
perty passing  
on death.

(2.) This section shall *inter alia* apply in Scotland to the conveyance or discharge of any life rent in favour of the fiar, or to the propulsiion of the fee under any simple or tailzied destination.

12.—(1.) The exclusion enacted by the proviso to section four of the Finance Act, 1894, of property from aggregation shall in the case of every person dying after the passing of this Act cease to have effect, except as regards property in which the deceased never had an interest.

Amendment  
of 57 and 58  
Vict. c. 30,  
§ 4, as to  
aggregation.

Provided that where an interest in expectancy (within the meaning of Part I. of the Finance Act, 1894) in any property has before the passing of this Act been *bond fide* sold or mortgaged for full consideration in money or money's worth, then no other duty on such property shall be payable by the purchaser or mortgagee when the interest falls into possession than would have been payable if this section had not passed; and in the case of a mortgage any higher duty payable by the mortgagor shall rank as a charge subsequent to that of the mortgagee.

(2.) Where settled property passes, or is deemed to pass, on the death of a person dying after the passing of this Act under a disposition made by a person dying before the commencement of Part I. of the Finance Act, 1894, and such property would, if the disponent had died after the commencement of the said Part, have been liable to Estate duty upon his death, the aggregation of such property, with other property passing upon the first-mentioned death, shall not operate to enhance the rate of duty payable either upon the settled property or upon any other property so passing by more than one half per cent. in excess of the rate at which duty would have been payable if such settled property had been treated as an estate by itself.

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Amendment  
of 59 and 60  
Vict. c. 28,  
§ 17, as to  
exclusion  
of fractions  
from value.

13.—(1.) For the purpose of determining the rate and the amount of duty, the exclusion under section seventeen of the Finance Act, 1896, of any fraction from the principal value of the estate shall in the case of every person dying after the passing of this Act cease to have effect.

(2.) The Commissioners of Inland Revenue may, if they think fit, accept a statement by or on behalf of any accountable person as a correction of any Inland Revenue affidavit or account within the meaning of Part I. of the Finance Act, 1894, for the purposes of that Act and the Acts amending that Act, without requiring that statement to be verified on oath.

Remission of  
death duties  
in case of  
persons  
killed in war.

14.—(1.) Where any person dies from wounds inflicted, accident occurring, or disease contracted, within twelve months before death, while on active service against an enemy, whether on sea or land, and was, when the wounds were inflicted, the accident occurred, or the disease was contracted, either subject to the Naval Discipline Act or subject to military law, whether as an officer, non-commissioned officer, or soldier, under Part V. of the Army Act, the Treasury may, if they think fit, on the recommendation of the Secretary of State or of the Admiralty, as the case requires, remit, or in the case of duty already paid repay, up to an amount not exceeding one hundred and fifty pounds in any one case, the whole or any part of the death duties (within the meaning of sub-section three of section thirteen of the Finance Act, 1894) leviable in respect of property passing upon the death of the deceased to his widow or lineal descendants if the total value for the purpose of Estate duty of the property so passing does not exceed five thousand pounds.

57 and 58  
Vict. c. 30.

(2.) This section shall take effect in the case of any person dying since the eleventh day of October one thousand eight hundred and ninety-nine.

XXVI.—MEMORANDUM IN REGARD TO RECEIVING AND RECORDING  
INVENTORIES AND OATHS PREPARED AND PRESENTED IN THE FORMS  
PROPOSED BY THE INLAND REVENUE COMMISSIONERS UNDER THE  
FINANCE ACT, 1894, AND OTHER MATTERS CONTAINED IN SAID ACT,

AND

ORDER OF COURT THEREON BY THE SHERIFF OF THE  
LOTHIANS AND PEEBLES.

The Revenue Act of 1808 (48 Geo. III. c. 149) contains enactments to the following effect :—

(Section 38) That a full and true inventory, duly stamped, of all the personal or moveable estate and effects of a deceased, already recovered, or known to be existing, distinguishing what shall be situated in Scotland, and what elsewhere, shall be exhibited upon oath in the proper Commissary Court, and recorded in the Books of such Court.

(Section 39) That the inventory so recorded shall be retained and transmitted by the Commissary Clerk to the Solicitor of Stamp Duties at Edinburgh; and that if the Commissary Clerk fails to retain or transmit any such inventory, or receive and record any inventory not duly stamped, he shall for each offence forfeit £50.

(Section 42) That it shall not be lawful to confirm or recover any estate not included in some such inventory, exhibited and recorded as aforesaid.

By the Finance Act (§ 6 (2)) an executor is required, on exhibiting and recording a duly stamped inventory under the Act of 1808 to pay Estate duty in respect of all personal property wheresoever situated, of which the deceased was competent to dispose at his death, and may pay in like manner the Estate duty on other property passing on such death.

In the new Forms it is proposed that the contents of the inventory shall be limited to such estate as might competently have been hitherto included in an inventory, and that heritable property and all other estate now liable in duty shall be annexed to the inventory in separate schedules, and specially referred to in the oath to the inventory as being so annexed, and such schedules are to be verified on oath.

The duty hitherto payable as a stamp impressed upon inventories is merged in the Estate duty, and the whole property subject to such duty is aggregated and the rate graduated. And it is proposed by the Inland Revenue that (except in small estate cases), instead of a denoting stamp being impressed on the inventory corresponding to the value of the estate contained in it, as formerly, a receipt by the Commissioners for the whole Estate duty payable under the Act, as deponed to in the oath to the inventory and set forth therein, and in schedules annexed thereto, shall be engrossed on the inventory, and be held equivalent to a stamp.

The new statute provides (§§ 16 and 23 (7)) that the Small Estates Acts shall apply with the necessary modifications to estates the gross value of which, subject to Estate duty, does not exceed £500. The inventory and oath were required by these Acts to be as nearly as may be in forms prescribed by schedules appended thereto, one form being applicable to intestate, and the other to testate cases. The Commissioners propose one form of inventory and oath for both testate and intestate cases, based upon the forms prescribed by the Statutes, with the necessary modifications required by the Finance Act.

The new Statute also provides (§ 23 (7)) that "an application under the said Acts" (Small Estates Acts) "may be made to any Commissary Clerk."

In the original Acts (38 and 39 Vict. c. 41, § 3; 39 and 40 Vict. c. 24, § 3) it was required that the application should be made to the clerk of the county where the deceased died domiciled, and the clerk was directed to fill up the forms and "expede" confirmation. It seems now to be intended that the application may be made to the clerk of any county. As the law stood before the passing of the new Act, it was competent to record inventories and grant confirmations only in the Sheriff Court of the county where the deceased died domiciled, and in cases where the domicile was furth of

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Scotland, or uncertain, only in Edinburgh (21 and 22 Vict. c. 56, §§ 3 and 8). The application was therefore always made to the clerk of the Sheriff Court which had power to grant confirmation, which is always issued in the Sheriff's name. No express change is made on the jurisdiction of the Sheriffs in this particular by the new Statute, or instructions given to the clerk who may receive the application to transmit it to the proper Court.

The new Act (§ 23 (7)) provides that "any Commissary Clerk shall affix the seal of Court to any *representation* granted in England or Ireland, upon the same being sent to him for that purpose, enclosing a fee of two shillings and sixpence."

At present English and Irish grants of probate and letters of administration are, under the Confirmation and Probate Act of 1858 (21 and 22 Vict. c. 56, § 14), certified in the form prescribed by the Act by the Commissary Clerk of Edinburgh, on their being presented to him with a certificate that the deceased died domiciled in England or Ireland, as the case may be; which certificate (§ 15) is granted only where Scotch estate has been included in the grant, and such grants, with the Commissary Clerk's certificate endorsed upon them, are declared by the Statute (§ 14) to be equivalent to a confirmation granted in Scotland. The new Act does not say that the seal is to be held equivalent to the certificate.

The new Forms proposed by the Commissioners are herewith produced and referred to.

The points upon which instructions are desired are :

1. Is it necessary that the schedules annexed to an inventory should be recorded along with it, or may they be received with an inventory and transmitted to the Stamp Office without being recorded ?

2. Is the receipt proposed to be impressed on an inventory in lieu of a stamp a sufficient warrant for receiving and recording it, and issuing confirmation thereon, as duly stamped ?

3. Is the Form proposed for cases falling under the Small Estates Acts a sufficient compliance with the requirements of these Acts so that confirmation may proceed thereupon ; and is the Commissary Clerk bound to fill up the Forms annexed, and entitled to administer the oath relative thereto, as well as the oath to the inventory ?

4. Is the Commissary Clerk bound to receive application under the Small Estates Acts ; to record the inventories and oaths in the Books of his own Court, and to issue confirmation in name of the Sheriff of Edinburgh, without any regard to the deceased's domicile ?

5. Is the Commissary Clerk bound to affix the seal of Court to any English or Irish probate presented to him with a fee of 2s. 6d., without reference to where the deceased died domiciled, or whether Scotch estate is included in it ?

The SHERIFF, having considered the foregoing Memorandum and queries, is of opinion :

1. That it is not necessary that the schedules or statement and accounts annexed to an inventory should be recorded along with it ; and that they may be received and transmitted to the Stamp Office without being recorded.

2. That the receipt proposed to be impressed on an inventory in lieu of a stamp is a sufficient warrant for receiving and recording it, and issuing confirmation thereon as duly stamped.

3. That the Form proposed for cases falling under the Small Estates Acts, as extended by the Finance Act, is a sufficient compliance with the requirements of these Acts so that confirmation may proceed thereupon, and that the Commissary Clerk is bound to fill up the Forms annexed to the inventory, in so far as the information supplied by the applicant may enable him to do so ; and, in so far as such authority may be necessary, the Sheriff hereby grants authority to the Commissary Clerks to take the oath or affirmation of the applicant to such statements.

4. That the Finance Act does not alter the jurisdiction of the Sheriff Courts, or affect the conditions as to domicile under which confirmations are granted, and English or Irish estate included therein, except to the extent that the clerk of any Commissariat may receive applications under the Small Estates Acts. That the Act makes no provision for the application being transmitted to the Court entitled to grant and issue the confirmations, or for the confirmation being transmitted for delivery to the applicant. That—though it might be competent for the Supreme Court, under the powers conferred upon it by the Small Estates Acts, to frame and enact regulations which might make this provision effective—the Sheriff has no power to do so.

5. That the representations granted in England or Ireland to which the Commissary Clerk may affix the seal of Court must be limited to those where the requirements of the Confirmation and Probate Act, 1858, have been complied with, and where the gross estate does not exceed £500 ; and that where any such grant is sent or presented to the Commissary Clerk of Edinburgh, along with a full copy thereof, and a fee of 2s. 6d., he should, in terms of said Act, endorse thereon a certificate in the prescribed form, and affix the seal thereto, without any higher or other fee.

AND THE SHERIFF HEREBY ORDAINS AND ENACTS ACCORDINGLY, subject to any rules and orders which may be framed by the Court of Session by Act of Sederunt under the powers conferred by the Small Estates Acts already referred to, or otherwise competent.

(Signed) ALEXR. BLAIR.

Sheriff's Chambers,  
Edinburgh, 23rd August 1894.

## XXVII.—EXECUTORS (SCOTLAND) ACT, 1900.

63 AND 64 VICT. CAP. 55.

*An Act to amend the Law relating to Executors in Scotland.* [8th August 1900.]

Short title.

1. This Act may be cited as the Executors (Scotland) Act, 1900.

Executors nominate to have the powers and privileges of trustees.

2. All executors nominate shall, unless the contrary be expressly provided in the trust deed, have the whole powers, privileges, and immunities, and be subject to all the limitations and restrictions, which from time to time gratuitous trustees have, or are subject to, under the Trusts (Scotland) Acts, 1861 to 1898, or this Act, or any Act amending the same, and otherwise under the statute and common law of Scotland.

Who may be confirmed executors nominate.

3. Where a testator has not appointed any person to act as his executor, or failing any person so appointed, the testamentary trustees of such testator, original or assumed, or appointed by the Supreme Court (if any), failing whom any general donee or universal legatory or residuary legatee appointed by such testator, shall be held to be his executor nominate, and entitled to confirmation in that character.

Powers, &amp;c., of executors dative where more than one.

4. In all cases where confirmation is, or has been, granted in favour of more executors dative than one, the powers conferred by it shall accrue to the survivors or survivor, and while more than two survive a majority shall be a quorum, and each shall be liable only for his own acts and intromissions.

Confirmation to contain inventory.

5. All confirmations of personal estate shall have embodied therein, or appended thereto, the inventory of estate confirmed, and the forms of confirmation prescribed by the Confirmation of Executors (Scotland) Act, 1858, section ten, Schedules D. and E., shall be amended accordingly, by the insertion of words referring to the inventory as being embodied therein or appended thereto, or words to that effect.

Transmission of trust funds by executors of sole or last surviving trustee.

6. When any sole or last surviving trustee or executor nominate has died with any funds in Scotland standing or invested in his name as trustee or executor, confirmation by his executors nominate (if any) to the proper personal estate of such trustee or executor nominate, or the probate granted in England or Ireland to his executors, and produced and certified by the commissary clerk of Edinburgh shall, whether granted before or after the passing of this Act, be valid, and available to such executors for recovering such funds, and for assigning and transferring the same to such person or persons as may be legally authorised to continue the administration thereof, or, where no other act of administration remains to be performed, directly to the beneficiaries entitled thereto, or to any person or persons whom the beneficiaries may appoint to receive and discharge, realise and distribute the same, provided always that a note or statement of such funds shall have been appended to any inventory or additional inventory of the personal estate of such deceased trustee or executor nominate given up by his executors nominate in Scotland, and duly confirmed; and provided further that nothing herein contained shall bind executors of a deceased trustee or executor nominate to make up title to such funds, nor prejudice or exclude the right of any other person to complete a title to such funds by any proceedings otherwise competent.

Where confirmation *ad non executa* may be granted.

7. Where any confirmation has become inoperative by the death or incapacity of all the executors in whose favour it has been granted, no title to intromit with the estate confirmed therein shall, otherwise than in the circumstances and to the extent authorised by the preceding section, transmit to the representatives of any such executors whatever may be the extent of their beneficial interest therein, but

it shall be competent to grant confirmation *ad non executa* to any estate contained in the original confirmation which may remain unuplifted or untransferred to the persons entitled thereto, and such confirmation *ad non executa* shall be granted to the same persons, and according to the same rules as confirmations *ad omitta* are at present granted, and shall be a sufficient title to continue and complete the administration of the estate contained therein, provided always that nothing herein contained shall be held to affect the rights and preferences at present conferred by confirmation on executors creditors.

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8. Oaths and affirmations to inventories of personal estate given up to be recorded in any Sheriff Court and to revenue statements appended thereto may be taken before the Sheriff or Sheriff-Substitute, or any Commissioner appointed by the Sheriff, or before any Commissary Clerk or his Depute, or where the office of Commissary Clerk has been abolished before any Sheriff Clerk or his Depute, or before any Notary Public, Magistrate, or Justice of the Peace, in the United Kingdom, and also if taken in England or Ireland before any Commissioner for Oaths appointed by the Courts of these countries, or if taken at any place out of the United Kingdom, before any British Consul, or local Magistrate, or any Notary Public practising in such foreign country, or admitted and practising in Great Britain or Ireland. Before whom oaths may be taken.

9.—(1.) It shall be competent for any person entitled to apply for confirmation under the Intestates Widows and Children (Scotland) Act, 1875, and the Small Testate Estates (Scotland) Act, 1876, as extended by the Customs and Inland Revenue Act, 1881, section thirty-four, and the Finance Act, 1894, section sixteen, to apply to any officer of Inland Revenue duly appointed for the purpose, and the said officer shall prepare and fill up the necessary form of inventory and oath or affirmation and revenue statement appended thereto, and shall take the oath of the applicant thereto, and such evidence as he may think sufficient to establish the identity and relationship or title of the applicant and the value of the estate, and where caution is required shall also prepare and fill up the bond of caution, and on the same being signed, and such attestation of the sufficiency of the cautioner as he may consider necessary being obtained, and the said inventory and bond (if any) being duly stamped, where stamps are required, the said officer shall transmit the same, along with any testamentary writings that may be exhibited, and the prescribed *ad valorem* fee chargeable on the confirmation, to the Clerk of the Court, where confirmation falls to be issued. And the said Clerk, if satisfied that the applicant for confirmation is entitled thereto, shall record the inventory and relative writs (if any), and expedite confirmation, and transmit the same, with any writs which may fall to be returned, to the officer for delivery to the applicant. Amendment of Small Estates Acts. 38 & 39 Vict. c. 41. 39 & 40 Vict. c. 24. 47 & 48 Vict. c. 62.

(2.) Such appointments and regulations as may be necessary to give effect to the foregoing provision shall be made by or under the authority of the Commissioners of Inland Revenue.

PLACES WHERE APPLICATION MAY BE MADE TO REVENUE OFFICERS to prepare the Inventory and obtain Confirmation in Small Estate Cases, under the Executors (Scotland) Act, 1900, § 9. (Page 196.)

ABERDEEN—Aberdeen, Ballater, Inverurie, Peterhead. Ayr—Ayr, Kilmarnock. ARGYLL—Bowmore, Campbeltown, Port Ellen. BANFF—Aberlour, Duftown, Keith, Portsoy. CAITHNESS—Wick. DUMBARTON—Dumbarton. DUMFRIES—Dumfries, Langholm. EDINBURGH—Edinburgh. ELGIN—Elgin, Rothes. FIFE—Burntisland, Cupar, Dunfermline, Kirkcaldy, Markinch, Windygates. FORFAR—Brechin, Montrose. INVERNESS—Carbost, Drumnadrochit, Grantown, Inverness, Kyleakin, Lochcarron, Lochmaddy, Portree. LANARK—Coatbridge, Glasgow, Wishaw. LINLITHGOW—Bathgate, Bo'ness, Linlithgow, Queensferry (South). ORKNEY—Kirkwall. PERTH—Perth, Pitlochry. ROSS—Gairloch, Shieldaig, Tain, Ullapool. ROXBURGH—Kelso. STIRLING—Falkirk. SUTHERLAND—Bonar Bridge, Brora, Tongue.

## APPENDIX OF FORMS.

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### 1. PETITION FOR SPECIAL AUTHORITY TO ISSUE CONFIRMATION— VALIDITY OF WILL DOUBTFUL.

Commissariat of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians and  
Peebles, at Edinburgh,

A., B., and C. [*design them*],—Petitioners ;

The above named petitioners submit to the Court the condescendence and note of plea in law hereto annexed, and pray the Court,—

To grant warrant to the Commissary Clerk to issue confirmation in favour of the petitioners as executors-nominate of the deceased D., after designed.

#### CONDESCENDENCE.

1. The late D. [*design him*] died at [*place*], on [*date*], and had at the time of his death his ordinary or principal domicile in the county of Edinburgh [*or, as the case may be*].

2. The said D. left a settlement [*describe it*] which bears to have been duly executed in the presence of two witnesses, but said settlement contains a number of deletions and interlineations which are not authenticated by any reference to them in the testing clause. In particular, the names of E., F., and G., inserted in said settlement as the names of his executors are deleted, and the names of the petitioners interlined above them. The said E., F., and G. have no interest in the deceased's succession, and have declined to claim the office of executor. The whole of said settlement, including the deletions and interlineations referred to, is in the handwriting of the said D. [*or otherwise, as the case may be*].

3. The petitioners have prepared an inventory of the personal estate of the said D., with relative oath, which [*or, a draft of which*] they now produce along with the said settlement [*or, an extract of said settlement*].

#### NOTE OF PLEA IN LAW.

The petitioners being executors nominated by the deceased D., are, in the circumstances above set forth, entitled to confirmation of his personal estate.

[*Signed by Petitioners or their Law Agent,  
who shall add his address.*]

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**2. PETITION FOR SPECIAL AUTHORITY TO ISSUE CONFIRMATION—  
NOMINATION OF EXECUTORS NOT EXPRESS.**

*[Same as No. 1, except that instead of Condescendence 2, insert]—*

2. By his settlement [*describe it*] the said D. conveyed his whole estate to the petitioners, instructed them "to pay his debts," and "to carry out his wishes as to the disposal of his property," as set forth in said settlement; but failed to make any express nomination of executors or trustees. From the terms used by the said D., and from the whole tenor of his said settlement, however, it was evidently his intention that the petitioners should act as his executors.

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**3. PETITION FOR SPECIAL AUTHORITY TO ISSUE CONFIRMATION—  
EXECUTORS NOT NAMED.**

*[Same as No. 1, except that instead of Condescendence 2, insert]—*

2. The said D. left a settlement [*describe it*] in which he appointed his "only sister and her children" to be his sole executors and universal legatories. The only sister of the said D. was E. [*design her*], who predeceased him, and the petitioners are her only children.

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**3a. PETITION FOR SPECIAL AUTHORITY TO ISSUE CONFIRMATION—  
SUBSTITUTE DISPONEES, &C., NOT NAMED.**

*[Same as No. 1, except that instead of Condescendence 2, insert]—*

2. By settlement [*describe it*] the said D. disposed and assigned his whole estate [*or, his whole personal estate; or, the residue of his personal estate*] to E., "his heirs and assignees" [*or, "his executors and representatives whomsoever"*]. The said E. predeceased the said D., and the petitioners are his children and sole next of kin, and as such his heirs *in mobilibus* [*or, the petitioners are the executors-nominate of the said E. under his settlement, describe it*]. The petitioners are thus the substitute general disponees [*or, universal legatories; or, residuary legatees*], and as such executors-nominate of the said D., conform to writs produced.

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4. PETITION FOR SPECIAL AUTHORITY TO ISSUE CONFIRMATION—  
EXECUTORS NOT DESIGNED.

[Same as No. 1, except that instead of Condescendence 2, insert]—

2. The said D. by his settlement [*describe it*] named [*quote names*] to be his executors, but did not design the persons named, or describe them in any way so as to identify them, or distinguish them from other persons of the same names. The petitioners aver that they are the persons whom the said D. intended to appoint. They were, and had been for many years, intimate friends of the said D., and there were no other persons of the same names among his acquaintances.

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5. PETITION FOR SPECIAL AUTHORITY TO ISSUE CONFIRMATION—  
EXECUTORS WRONGLY NAMED OR DESIGNED.

[Same as No. 1, except that instead of Condescendence 2, insert]—

2. The said D. by his settlement [*describe it*] nominated and appointed the petitioners to be his executors, but in said settlement the petitioner A. was erroneously named [*quote name*], and the petitioner B. was erroneously designed [*quote designation*]. [*Here explain discrepancies, and state reasons for holding that the petitioners are the persons intended to be named.*]

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6. PETITION FOR SPECIAL AUTHORITY TO ISSUE CONFIRMATION—  
EXCLUDING EXECUTOR ABROAD.

[Same as No. 1, except that instead of Condescendence 2, insert]—

2. The said D. by his settlement [*describe it*] nominated and appointed the petitioners, along with E., to be his executors. The said E. is now resident in [India], and it has not yet been ascertained whether he will accept or decline said appointment, there not having been time to communicate with him on the subject. To delay confirmation until an answer from him can be obtained would be injurious to the estate. He has no beneficial interest in the succession of the said D. [*or state extent of his interest*]. As the acting of the said E. as a trustee and executor, while resident abroad, would only impede the execution of the trust, the petitioners, who are sufficient in number to carry out its purposes in the meantime, have advised the said E. to decline, under their obligation to assume him should he desire it on his return to this country [*or state the facts according to the circumstances of the case*].

7. PETITION FOR SPECIAL AUTHORITY TO ISSUE CONFIRMATION—  
EXECUTOR NOT FOUND.

[Same as No. 1, except that instead of *Condescendence 2*, insert]—

2. The said D. by his settlement [*describe it*] nominated and appointed the petitioners, along with E., to be his executors. The said E. left this country some years ago, intending to go to [Australia], but no communication has ever been received from him by his friends here, and his present address cannot be ascertained [*mention briefly what means have been used to ascertain it*]. He has no beneficial interest in the deceased's estate [*or state the extent of his interest*]. The petitioners are a majority of those named by the deceased [*or otherwise, as the case may be*]. The estate requires to be immediately realised and distributed for the benefit of those to whom the deceased has bequeathed it.

8. PETITION FOR AUTHORITY TO ISSUE CONFIRMATION—  
OBJECTIONS LODGED.

[Same as No. 1, except that instead of *Condescendence 2*, insert]—

2. The said D. by his settlement [*describe it*] nominated and appointed the petitioners to be his executors, who have applied for confirmation in the ordinary manner, but have received intimation from the Commissary Clerk that confirmation cannot be issued without the special authority of the Court, in respect that objections have been lodged by E. [*design him*]. [*Further averments will be framed so as to meet the objections raised.*]

9. PETITION FOR SPECIAL AUTHORITY TO ISSUE CONFIRMATION—  
WILL IMPROBATIVE AND PROOF OF DUE EXECUTION REQUIRED.

[Same as No. 1, except that instead of *Condescendence 2*, insert]—

2. The said D. by his settlement [*describe it*], subscribed by him, and bearing to be attested by two witnesses subscribing, nominated and appointed the petitioners to be his executors. The subscribing witnesses to said settlement were [*give full names and designations*], and the subscriptions appended to said settlement are the genuine subscriptions of the said testator and of the said witnesses; but the designations of the said witnesses are not contained in the testing clause thereof, nor appended to their signatures. The said settlement having been recorded in the books of Council and Session on [*date*], the designations of said witnesses



## 12. AFFIDAVIT OR CERTIFICATE AS TO FOREIGN LAW.

I [*Judge, Registrar, Notary Public, or other qualified person*], being well acquainted with the laws and constitutions of [*foreign state*], depone or certify, as follows :—

(a) *Where Deceased Died Intestate.*

1. That the said deceased having died intestate, by the said laws the persons entitled to succeed to and administer his estate are his widow and children [*or his widow as guardian of her children, or father, or mother, or next of kin*].

(b) *Where Will Founded On.*

1. That the will of [*name and designation*], prefixed or appended hereto [*or, of which the foregoing document is a notarial [or official] copy*], is validly executed according to the law of [*said state*].

2. That the said copy is duly authenticated and entitled to the same credit and effect as the original will.

3. That the testamentary executors named therein are entitled to obtain possession of the deceased's estate without giving sureties or finding caution ;

*or,*

3. That the heirs or legatees named by the deceased in the said will are entitled to the administration of his personal estate.

## 12a. CONSULAR CERTIFICATE AS TO FOREIGN DOCUMENTS.

I [*name*], Consul for the United States at [*place*], hereby certify that the foregoing copy last will and testament and probate thereof are duly authenticated according to the law and practice of the State of [*specify State*], and entitled to full faith and credit throughout said States and elsewhere.—Witness my hand and Consular Seal this      day of      19      .

## 12b. CERTIFICATE AS TO TRANSLATION.

I [*Consul, Notary Public, Professor, or other qualified person*], being well acquainted with the French language do hereby certify that the foregoing is a true and faithful translation into the English language of the document in the French language, to which it is appended.

**13. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—GENERAL DISPONEE, UNIVERSAL LEGATORY, OR RESIDUARY LEGATEE, by Succession.**

Commissariat of Edinburgh.

In the Sheriff-Court of the Lothians and Peebles,  
at Edinburgh.

A. [*design him or her, and if a married woman, add, with consent and concurrence of her husband*],—Petitioner;

The above named petitioner submits to the Court the condescendence and note of plea in law hereto annexed, and prays the Court,—

To decern the petitioner executor-dative *qua* general donee [*or, universal legatory; or, residuary legatee*], by succession, to the deceased D., after designed.

CONDESCENDENCE.

1. The late D. [*design him*] died at [*place*], on [*date*], and had at the time of his death his ordinary or principal domicile in the County of Edinburgh [*or, without any fixed or known domicile except that the same was in Scotland*].

2. By settlement [*describe it*] produced, the said D. disposed and assigned his whole estate [*or, his whole personal estate; or, the residue of his estate*] to B., who survived him, but died without expediting confirmation to his estate. The petitioner is the executor-nominate [*or, dative*] of the said B., and has expedited confirmation to his estate, including therein his interest in the estate of D., conform to confirmation [*describe it*] also herewith produced. The petitioner is thus the general donee [*or, universal legatory; or, residuary legatee*] of the said D., by succession to the said B.

NOTE OF PLEA IN LAW.

The petitioner, being general donee [*or, universal legatory; or, residuary legatee*] of the said D., by succession to B., is entitled to be decerned executor-dative.

[*Signed by Petitioner, or his [or, her] Law Agent, who shall add his address.*]

14. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—  
DOMICILE IN SCOTLAND—NEXT OF KIN—CHILD.

Commissariat of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians and Peebles,  
at Edinburgh,

A. [*design him or her, if a married woman, add, with consent and concurrence of her husband*],—Petitioner ;

The above named petitioner submits to the Court the condescendence and note of plea in law hereto annexed, and prays the Court,—

To decern the petitioner executor-dative *qua* next of kin to the deceased D., after designed.

CONDESCENDENCE.

1. The late D. [*design him*] died at [*place*], on [*date*], and had at the time of his death his ordinary or principal domicile in the county of Edinburgh [*or, without any fixed or known domicile, except that the same was in Scotland*].

2. The petitioner is a son [*or, daughter*], and one of the next of kin of the said D.

NOTE OF PLEA IN LAW.

The petitioner, being one of the next of kin of the said D., is entitled to be decerned his executor-dative.

[*Signed by Petitioner or his [or, her] Law Agent,  
who shall add his address.*]

15. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE  
IN SCOTLAND—NEXT OF KIN—GRANDCHILD.

[*Same as No. 14, except that instead of Condescendence 2, insert*]—

2. The petitioner is a son [*or, daughter*] of the late B. [*design him*], who was a son of the said D., and who predeceased him. The said D. was not survived by any other son or daughter. The petitioner is thus a grand-son [*or, granddaughter*], and one of the next of kin of the said D.

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**16. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—NEXT OF KIN—BROTHER OR SISTER GERMAN.**

*[Same as No. 14, except that instead of Condescendence 2, insert]—*

2. The petitioner is a brother [*or, sister*] german of the said D., who died without issue, and is thus one of his next of kin.

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**17. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—NEXT OF KIN—NEPHEW OR NIECE—FULL BLOOD.**

*[Same as No. 14, except that instead of Condescendence 2, insert]—*

2. The petitioner is a nephew [*or, niece*] of the said D., being a son [*or, daughter*] of B. [*design him or her*], brother [*or, sister*] german of the said D., who died without issue, and who was not survived by any brothers or sisters german; and the petitioner is thus one of his next of kin.

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**18. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—NEXT OF KIN—BROTHER OR SISTER CONSANGUINEAN.**

*[Same as No. 14, except that instead of Condescendence 2, insert]—*

2. The petitioner is a brother [*or, sister*] consanguinean of the said D., who died without issue, and without being survived by any brothers or sisters german, or their descendants; and is thus one of his next of kin.

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**19. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—NEXT OF KIN—NEPHEW OR NIECE—HALF-BLOOD.**

*[Same as No. 14, except that instead of Condescendence 2, insert]—*

2. The petitioner is a nephew [*or, niece*] by the half-blood of the said D., being a son [*or, daughter*] of B., who was a brother [*or, sister*] consanguinean of the said D. The said D. died without issue, and without leaving any brothers or sisters german, or their descendants, and without being survived by any brother or sister consanguinean; and the petitioner is thus one of his next of kin.

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**20. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN  
SCOTLAND—NEXT OF KIN—FATHER.**

*[Same as No. 14, except that instead of Condescendence 2, insert]—*

2. The petitioner is the father of the said D., who died without issue, and without leaving any brothers or sisters german or consanguinean or their descendants; and the petitioner is thus his next of kin.

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**21. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN  
SCOTLAND—NEXT OF KIN—UNCLE OR AUNT—FULL-BLOOD.**

*[Same as No. 14, except that instead of Condescendence 2, insert]—*

2. The petitioner is the paternal uncle [*or, aunt*] of the said D., being a brother [*or, sister*] of B., who was the father of the said D. The said D. died without leaving issue, or any brothers or sisters german or consanguinean, or their descendants, and predeceased by his father: and the petitioner is thus one of his next of kin.

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**22. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN  
SCOTLAND—NEXT OF KIN—COUSIN GERMAN.**

*[Same as No. 14, except that instead of Condescendence 2, insert]—*

2. The petitioner is a cousin german of the said D., being a son [*or, daughter*] of B., who was a brother [*or, sister*] of E., the father of the said D. The said D. died without issue, and without leaving any brothers or sisters german or consanguinean, or their descendants, and without being survived by his father or by any paternal uncles or aunts; and the petitioner is thus one of his next of kin.

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**23. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—NEXT OF KIN—UNCLE OR AUNT—HALF-BLOOD.**

*[Same as No. 14, except that instead of Condescendence 2, insert]—*

2. The petitioner is the uncle [*or, aunt*] by the half-blood of the said D., being the brother [*or, sister*] consanguinean of B., who was the father of the said D. The said D. died without leaving issue, or any brothers or sisters german or consanguinean, or their descendants, and predeceased by his father, who left no brothers or sisters german, or their descendants [*or, none who survived the said D.*]; and the petitioner is thus one of the next of kin of the said D.

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**24. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—NEXT OF KIN—COUSINS—HALF-BLOOD.**

*[Same as No. 14, except that instead of Condescendence 2, insert]—*

2. The petitioner is a cousin by the half-blood of the said D., being a son [*or, daughter*] of B., who was a brother [*or, sister*] consanguinean of E., the father of the said D. The said D. died without leaving issue, or any brothers or sisters german or consanguinean, or their descendants, and his father predeceased him without leaving any brothers or sisters german or their descendants, or any brothers or sisters consanguinean [*or, none who survived the said D.*], and the petitioner is thus one of the next of kin of the said D.

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**25. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—NEXT OF KIN—GRANDFATHER.**

*[Same as No. 14, except that instead of Condescendence 2, insert]—*

2. The petitioner is the paternal grandfather of the said D., who died without issue, and without leaving any brothers or sisters german or consanguinean, or their descendants, and predeceased by his father B., who left no brothers or sisters german or consanguinean, or their descendants [*or, none who survived the said D.*], and the petitioner is thus next of kin of the said D.

**26. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—REPRESENTATIVE OF THE NEXT OF KIN.**

[*Same as No. 14, except that instead of the Petitioner's title "Next of Kin," insert "Representative of the Next of Kin," and instead of Condescendence 2, insert*]

2. The said D. died without issue, survived by his brother B., who was thus his next of kin, but who died without having expedite confirmation to his estate. The petitioner is the son and next of kin [*or, executor-nominate and universal legatory conform to settlement [describe it] produced*], and thus the representative of the said B., the next of kin of the said D.

**27. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—RELICT OR HUSBAND.**

[*Same as No. 14, except that instead of the Petitioner's title "Next of Kin," insert "Relict," or "Husband," and instead of Condescendence 2, insert*]

2. The petitioner is the relict [*or, husband*] of the said D.

**28. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—CREDITOR OF DECEASED.**

[*Same as No. 14, except that instead of the Petitioner's title "Next of Kin," insert "Creditor," and instead of Condescendence 2, insert*]

2. The petitioner is a creditor of the said D. to the extent of £ , conform to promissory note granted by the said D. in favour of the petitioner [*describe it*]*—or conform to disposition by the said D. [describe it], to which the petitioner acquired right by assignation [describe it]—or conform to decree cognitionis causa by the Lords of Council and Session [describe it]—which [or, an extract whereof] is herewith produced.*

**FORM OF INTIMATION IN "GAZETTE."**

NOTICE.—A Petition has been presented in the Sheriff-Court at Edinburgh by A. [*name and designation*] for decerniture as Executor-dative *qua* Creditor (Funerator) to the deceased D. [*name and designation*].

**29. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE  
IN SCOTLAND—CREDITOR OF NEXT OF KIN.**

[Same as No. 14, except that instead of the *Petitioner's* title "Next of Kin," insert "Creditor of Next of Kin," and instead of *Condescendence* 2, insert]—

2. The said D. died intestate, and was survived by B., his son and next of kin, who has declined [or, delayed] to expedite confirmation to the said D.'s estate. The petitioner is a creditor of the said B. to the extent of £ , conform to [describe liquid ground of debt as in Form No. 28].

For Gazette intimation see Form 28.

**30. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE  
IN SCOTLAND—FUNERATOR.**

[Same as No. 14, except that instead of *Petitioner's* title "Next of Kin," insert "Funerator," and instead of *Condescendence* 2, insert]—

2. The petitioner is funerator of the said D., having taken charge of the arrangements for the funeral, and paid the undertaker's account, amounting to £ , which account, duly discharged, is herewith produced. The estate left by the said D. is of small amount, and is believed to be insufficient to pay his debts. He is not known to have left any will, and his only next of kin is B., who declines to apply for the office of executor [or state under what other circumstances the application is made].

For Gazette intimation see Form 28.

**31. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE  
IN SCOTLAND—LEGATEE.**

[Same as No. 14, except that instead of the *Petitioner's* title "Next of Kin," insert "Legatee," and instead of *Condescendence* 2, insert]—

2. The petitioner is a legatee of the said D. to the extent of £ , conform to settlement [describe it] produced.

**32. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE  
IN SCOTLAND—STATUTORY BENEFICIARY—FATHER.**

Commissariat of Edinburgh.

In the Sheriff-Court of the Sheriffdom of the Lothians  
and Peebles, at Edinburgh,

A. [*design him*],—Petitioner ;

The above named petitioner submits to the Court the condescendence  
and note of plea in law hereto annexed, and prays the Court,—

To decern the petitioner executor-dative and father to the deceased D.,  
after designed.

**CONDESCENDENCE.**

1. The late D. [*design him*] died at [*place*], on [*date*], and had at the  
time of his death his ordinary or principal domicile in the county of Edin-  
burgh [*or*, without any fixed or known domicile, except that the same was  
in Scotland].

2. The petitioner is the father of the said D., who died intestate, with-  
out leaving issue, but survived by brothers or sisters [*or* their descendants],  
and the petitioner has right to one-half of his moveable estate.

**NOTE OF PLEA IN LAW.**

The petitioner having right to share in the moveable succession of the  
said D., is entitled to be decerned his executor-dative.

[*To be signed by Petitioner or his Law Agent,  
who shall add his address.*]

**33. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN  
SCOTLAND—STATUTORY BENEFICIARY—MOTHER.**

[*Same as No. 32, except that in the prayer instead of “qua Father,”  
insert “qua Mother,” and instead of Condescendence 2, insert*—

2. The petitioner is the mother of the said D., who died intestate, with-  
out leaving issue, and whose father predeceased him, and the petitioner has  
right to one-third of his moveable estate.

**34. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—STATUTORY BENEFICIARY—BROTHER OR SISTER UTERINE.**

*[Same as No. 32, except that in the prayer instead of "qua Father," insert "qua Brother uterine," or "qua Sister uterine," and instead of Condescendence 2, insert]—*

2. The petitioner is a brother [*or, sister*] uterine of the said D., who died intestate, without leaving issue, or any brothers or sisters german, or consanguinean, or their descendants, and whose father and mother both predeceased him; and the petitioner has right, along with his other brothers and sisters uterine [*if any*], and the descendants of a predeceasing brother [*or, sister*] uterine [*if any*] to one-half of his moveable estate.

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**35. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—STATUTORY BENEFICIARY—CHILD OF A PREDECEASING NEXT OF KIN.**

*[Same as No. 32, except that in the prayer instead of "qua Father," insert "qua Child of a Predeceasing Next of Kin," and instead of Condescendence 2, insert]—*

2. The surviving next of kin of the said D. were his brothers and sisters, he having died without issue. The petitioner is a son [*or, daughter*] of B., who was also a brother [*or, sister*] of the said D., but predeceased him. The petitioner is thus child of a predeceasing next of kin of the said D., and has right, along with his brothers and sisters [*if any*], and the descendants of a brother [*or, sister*] [*if any*], to the share of the moveable estate of the said D., to which the said B. would have been entitled had he [*or, she*] survived the said D.

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**36. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—MINOR AND PUPIL NEXT OF KIN, WITH THEIR ADMINISTRATOR IN LAW.**

Commissariat of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians  
and Peebles, at Edinburgh,

A. and B. [*design them*], who are in minority, and C. and E. [*design them*],  
who are in pupillarity, all children of F. [*design him*], and the said  
F. as their administrator in law,—Petitioners;

The above named petitioners submit to the Court the condescendence  
and note of plea in law hereto annexed, and pray the Court,—

To decern the petitioners A., B., C., and E., executors-dative *qua* next  
of kin to the deceased D., after designed;

*or,*

To decern the petitioners executors-dative to the deceased D., after  
designed, the said A., B., C., and E., *qua* next of kin, and the  
said F., their father, as their administrator in law.

**CONDESCENDENCE.**

1. The late D. [*design him*] died at [*place*], on [*date*], and had at the  
time of his death his ordinary or principal domicile in the county of Edin-  
burgh [*or, without any fixed or known domicile, except that the same was*  
*in Scotland*].

2. The petitioners A., B., C., and E. are the nephews and nieces and  
next of kin of the said D., who died without issue, and predeceased by  
his only sister G., the mother of the petitioners. The said F. is their  
father and administrator in law.

**NOTE OF PLEA IN LAW.**

The petitioners A., B., C., and E., being the next of kin of the said  
D., are entitled to be decerned his executors-dative [and the said F.,  
being their father and administrator in law, is entitled to be decerned  
executor-dative along with them].

[*To be signed by the Petitioners or their Law Agent,  
who shall add his address.*]

**37. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE — DOMICILE IN SCOTLAND—MINOR AND PUPIL NEXT OF KIN, WITH THEIR TUTORS AND CURATORS.**

Commissariat of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians  
and Peebles, at Edinburgh,

A. and B. [*design them*], who are in minority, and C. and E. [*design them*], who are in pupillarity, all children of the late F. [*design him*], and G. and H. [*design them*], tutors and curators to the said children, nominated and appointed by the said F. in his settlement [*describe it*], herewith produced,—Petitioners ;

The above named petitioners submit to the Court the condescendence and note of plea in law hereto annexed, and pray the Court,—

To decern the petitioners A., B., C., and E., executors-dative *qua* next of kin to the deceased D. after designed ;

or,

To decern the petitioners executors-dative to the deceased D. after designed, the said A., B., C., and E., *qua* next of kin, and the said G. and H. as their tutors and curators foresaid.

**CONDESCENDENCE.**

1. The late D. [*design her*] died at [*place*], on [*date*], and had at the time of her death her ordinary or principal domicile in the county of Edinburgh [*or, without any fixed or known domicile, except that the same was in Scotland*].

2. The petitioners A., B., C., and E., are the children and only next of kin of the said D., and the said G. and H. are their tutors and curators foresaid.

**NOTE OF PLEA IN LAW.**

The petitioners A., B., C., and E., being the next of kin of the said D., are entitled to be decerned her executors-dative [and the said G. and H., being their tutors and curators, are entitled to be decerned executors-dative along with them].

[*To be signed by the Petitioners or their Law Agent,  
who shall add his address.*]

### 38. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—MINOR AND PUPIL NEXT OF KIN, WITH THEIR FACTOR.

Commissariat of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. and B. [*design them*], who are in minority, and C. and E. [*design them*], who are in pupillarity, and F., factor for them on the executry estate of D., after designed, appointed by the Sheriff Substitute of Edinburgh, conform to appointment dated \_\_\_\_\_, —  
Petitioners;

The above named petitioners submit to the Court the condescendence and note of plea in law hereto annexed, and pray the Court,—

To decern the petitioners executors-dative to the deceased D., after designed, the said A., B., C., and E., *qua* next of kin, and the said F. as their factor foresaid.

#### CONDESCENDENCE.

1. The late D. [*design him*] died at [*place*], on [*date*], and had at the time of his death his ordinary or principal domicile in the county of Edinburgh [*or*, without any fixed or known domicile, except that the same was in Scotland].

2. The petitioners A., B., C., and E., are the children and next of kin of the said D., and the said F. is their factor foresaid.

#### NOTE OF PLEA IN LAW.

The said A., B., C., and E., being the next of kin of the said D., are entitled to be decerned his executors-dative, and the said F., being factor for them on the executry estate of the said D., is entitled to be decerned along with them.

[*To be signed by the Petitioners or their Law Agent,  
who shall add his address.*]

### 39. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—FACTOR FOR MINOR AND PUPIL NEXT OF KIN ON EXECUTRY ESTATE.

Commissariat of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. [*design him*], factor for B. and C. [*design them*], who are in minority, and E. and F. [*design them*], who are in pupillarity, on the executry

estate of D., after designed, appointed by the Sheriff-Substitute of Edinburgh, conform to appointment dated \_\_\_\_\_, —Petitioner;

The above named petitioner submits to the Court the condescendence and note of plea in law hereto annexed, and prays the Court,—

To decern the petitioner executor-dative to D., after designed, *qua* factor for his minor and pupil next of kin on his executry estate.

#### CONDESCENDENCE.

1. The late D. [*design him*] died at [*place*], on [*date*], and had at the time of his death his ordinary or principal domicile in the county of Edinburgh [*or, without any fixed or known domicile, except that the same was in Scotland*].

2. The said A. is factor as aforesaid for B., C., E., and F., who are the children and next of kin of the said D.

#### NOTE OF PLEA IN LAW.

The petitioner being factor for the next of kin of the said D. on his executry estate, is entitled to be decerned as his executor-dative.

[*To be signed by the Petitioner or his Law Agent,  
who shall add his address.*]

#### 40. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE — DOMICILE IN SCOTLAND—*Curator Bonis* AND FACTOR *loco Tutoris* TO NEXT OF KIN.

Commissariat of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians and Peebles,  
at Edinburgh,

A. [*design him*], *curator bonis* to B. and C. [*design them*], and factor *loco tutoris* to E. and F. [*design them*], conform to Act and Decree of the Lords of Council and Session dated \_\_\_\_\_, an extract of which is produced,—Petitioner;

The above named petitioner submits to the Court the condescendence and note of plea in law hereto annexed, and prays the Court,—

To decern the petitioner executor-dative to the late D., after designed, *qua curator bonis* and factor *loco tutoris* to his next of kin.

## CONDESCENDENCE.

1. The late D. [*design him*] died at [*place*], on [*date*], and had at the time of his death his ordinary or principal domicile in the county of Edinburgh [*or, without any fixed or known domicile, except that the same was in Scotland*].

2. The petitioner is *curator bonis* and factor *loco tutoris* foresaid to the said B., C., E., and F., who are the children and next of kin of the said D.

## NOTE OF PLEA IN LAW.

The petitioner being *curator bonis* and factor *loco tutoris* to the next of kin of the said D., is entitled to be decerned his executor-dative.

[*To be signed by the Petitioner or his Law Agent,  
who shall add his address.*]

## 41. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE — DOMICILE IN SCOTLAND—JUDICIAL FACTOR ON DECEASED'S ESTATE.

## Commissariat of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians and Peebles,  
at Edinburgh,

A. [*design him*], judicial factor on the estate [*or, on the trust estate*] of the late D., after designed, conform to Act and Decree of the Lords of Council and Session, dated \_\_\_\_\_, an extract of which is produced,—Petitioner;

The above named petitioner submits to the Court the condescendence and note of plea in law hereto annexed, and prays the Court,—

To decern the petitioner executor-dative to the deceased D., after designed, *qua* judicial factor on his estate [*or, on his trust estate*].

## CONDESCENDENCE.

1. The late D. [*design him*] died at [*place*], on [*date*], and had at the time of his death his ordinary or principal domicile in the County of Edinburgh [*or, without any fixed or known domicile, except that the same was in Scotland*].

2. The petitioner is judicial factor foresaid on the estate of the said D. [*or, on the trust estate of the said D. under his trust disposition [describe it], in which the said D. nominated and appointed B. and C. to be his trustees and executors, but who both declined to accept*].

## NOTE OF PLEA IN LAW.

The petitioner being judicial factor on the estate [*or, on the trust estate*] of the said D., is entitled to be decerned his executor-dative.

[*To be signed by the Petitioner or his Law Agent,  
who shall add his address.*]

**42. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE FURTH OF SCOTLAND—ENGLISH LAW—RELICT OR HUSBAND.**

Commissariot of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians and Peebles,  
at Edinburgh,

A. [*design her or him*],—Petitioner ;

The above named petitioner submits to the Court the condescendence and note of plea in law hereto annexed, and prays the Court,—

To decern the petitioner executor-dative *qua* relict [*or, husband*] to the deceased D., after designed.

CONDESCENDENCE.

1. The late D. [*design him or her*] died at [*place*], on [*date*], and had at the time of his [*or, her*] death his [*or, her*] ordinary or principal domicile furth of Scotland.

2. The petitioner is the relict [*or, husband*] of the said D., who died intestate, and by the law of \_\_\_\_\_, where the said D. died domiciled, is entitled to the administration of his [*or, her*] personal estate.

NOTE OF PLEA IN LAW.

The petitioner being entitled by the law of the deceased's domicile to the administration of his [*or, her*] personal estate, is entitled to be decerned his [*or, her*] executor-dative.

[*Signed by the Petitioner or her [or, his] Law Agent,  
who shall add his address.*]

**43. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE FURTH OF SCOTLAND—ENGLISH LAW—CHILD AS NEXT OF KIN.**

[*Same as No. 42, except that in the prayer, instead of "qua Relict," insert "qua Next of Kin," and instead of Condescendence 2, insert*—

2. The petitioner is the son [*or, daughter*] of the said D., who died intestate, and whose wife [*or, husband*] predeceased him [*or, her*] (or whose wife [*or, husband*] survived him [*or, her*], but has renounced the right to administer his [*or, her*] estate), and by the law of \_\_\_\_\_, where the said D. died domiciled, the petitioner is entitled to the administration of his [*or, her*] personal estate.

**44. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE FURTH OF SCOTLAND—ENGLISH LAW—FATHER.**

[*Same as No. 42, except that in the prayer, instead of "qua Relict," insert "qua Father," and instead of Condescendence 2, insert*—

2. The petitioner is the father of the said D., who died a bachelor [*or, a spinster*] and intestate, and by the law of \_\_\_\_\_, where the said D. died domiciled, the petitioner is entitled to the administration of his [*or, her*] estate.

**45. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE FURTH OF SCOTLAND—ENGLISH LAW—MOTHER.**

[*Same as No. 42, except that in the prayer, instead of "qua Relict," insert "qua Mother," and instead of Condescendence 2, insert*—

2. The petitioner is the mother of the said D., who died a bachelor [*or, a spinster*] without a father, and intestate, and by the law of \_\_\_\_\_, where the said D. died domiciled, the petitioner is entitled to the administration of his [*or, her*] estate.

**46. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE FURTH OF SCOTLAND—ENGLISH LAW—BROTHER OR SISTER AS NEXT OF KIN.**

[*Same as No. 42, except that in the prayer, instead of "qua Relict," insert "qua Next of Kin," and instead of Condescendence 2, insert*—

2. The petitioner is the brother [*or, sister*] and next of kin of the said D., who died a bachelor [*or, a spinster*] without parent and intestate, and by the law of \_\_\_\_\_, where the deceased died domiciled, the petitioner is entitled to the administration of his [*or, her*] estate.

**47. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE FURTH OF SCOTLAND—CONFORM TO APPOINTMENT IN FOREIGN COURT.**

Commissariat of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians and Peebles, at  
Edinburgh,

A. [*design him*],—Petitioner ;

The above named petitioner submits to the Court the condescendence and note of plea in law hereto annexed, and prays the Court,—

To decern the petitioner executor-dative *qua* brother, and administrator [*or, curator on the succession, or other character, as the case may be*] of the deceased D., after designed.

## CONDESCENDENCE.

1. The late D. [*design him*] died at [*place*], on [*date*], and had at the time of his death his ordinary or principal domicile furth of Scotland.

2. The petitioner is the brother of the said D., and administrator [*or, curator*] of his personal estate, appointed by [*describe the Court*] within whose jurisdiction the said D. died domiciled, conform to letters of administration [*or, other writ instructing the appointment*] produced.

## NOTE OF PLEA IN LAW.

The petitioner being the administrator of the deceased's personal estate, appointed by the Court of his domicile, is entitled to be decerned his executor-dative.

[*To be signed by the Petitioner or his Law Agent,  
who shall add his address.*]

#### 48. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE FURTH OF SCOTLAND—CONFORM TO OPINION ON FOREIGN LAW.

Commissariat of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. [*design him*],—Petitioner ;

The above named petitioner submits to the Court the condescendence and note of plea in law hereto annexed, and prays the Court,—

To decern the petitioner executor-dative *qua* [*insert character in terms of the opinion*] to the deceased D., after designed.

## CONDESCENDENCE.

1. The late D. [*design him*] died at [*place*], on [*date*], and had at the time of his death his ordinary or principal domicile furth of Scotland.

2. The petitioner is [*state relationship or other character giving right to the office in accordance with opinion*] and is by the law of \_\_\_\_\_, where the deceased died domiciled, entitled to the administration of his estate conform to opinion by B. [*name and description qualifying him to give such opinion*] herewith produced.

## NOTE OF PLEA IN LAW.

The petitioner being entitled by the law of the deceased's domicile to the administration of his personal estate, is entitled to be decerned his executor-dative.

[*To be signed by the Petitioner or his Law Agent,  
who shall add his address.*]

**49. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE  
UNCERTAIN—APPLICANT ALTERNATIVELY ENTITLED.**

Commissariat of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians and Peebles, at  
Edinburgh,

A. [*design him*],—Petitioner ;

The above named petitioner submits to the Court the condescendence  
and note of plea in law hereto annexed, and prays the Court,—

To decern the petitioner executor-dative *qua* father [*or other character*]  
to the deceased D., after designed.

**CONDESCENDENCE.**

1. The late D. [*design him*], sometime residing in Edinburgh, thereafter  
in New York, thereafter in Melbourne, died on a voyage from Melbourne  
to New York on [*date*], without any fixed or known domicile.

2. The petitioner is father of the said D., who died intestate, unmarried,  
and without issue, and by the law of the State of New York and of the  
Colony of Victoria, as well as by the law of Scotland, in one or other of  
which countries the said D. died domiciled, the petitioner is entitled to the  
administration of his estate.

**NOTE OF PLEA IN LAW.**

The petitioner being entitled by the law of the deceased's domicile to  
the administration of his personal estate, is entitled to be decerned his  
executor-dative.

[*To be signed by the Petitioner or his Law Agent,  
who shall add his address.*]

**50. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE ON AUTHORITY  
GRANTED UNDER PRESUMPTION OF LIFE LIMITATION (SCOTLAND)  
ACT, 1891.**

Commissariat of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians and Peebles, at  
Edinburgh,

A. and B. [*design them*],—Petitioners ;

The above named petitioners submit to the Court the condescendence and  
note of plea in law hereto annexed, and pray the Court,—

To decern the petitioners executors-dative *qua* next of kin to D., after  
designed.

## CONDESCENDENCE.

1. The late D. [*design him*] is presumed to have died on the [*date fixed by the Court*] and was at said date domiciled in the county of Edinburgh [*or, without any fixed or known domicile, except that the same was in Scotland*].

2. That by Decree of the Lords of Council and Session [*or, of the Sheriff of* ] under the Presumption of Life Limitation (Scotland) Act, 1891, dated , it was found that the said D. should be presumed to have died on [*date*], conform to Extract Decree [*or, copy certified by Clerk of Court*] produced.

3. That the petitioners are brothers of the said D. who died intestate and without lawful issue, and are thus two of his next of kin.

## NOTE OF PLEA IN LAW.

The petitioners being the next of kin of the said D. who is presumed to have died on , are entitled to be decerned his executors-dative.

[*To be signed by the Petitioners or their Law Agent,  
who shall add his address.*]

# 51. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE, *ad omisssa* [*et male appretiatia*].

Commissariot of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians and Peebles, at  
Edinburgh,

A. [*design him*],—Petitioner ;

The above named petitioner submits to the Court the condescendence and note of plea in law hereunto annexed, and prays the Court,—

To decern the petitioner executor-dative *ad omisssa* [*et male appretiatia*]  
*qua* next of kin [*or other title, as the case may be*], to the deceased  
D. after designed.

## CONDESCENDENCE.

1. The late D. [*design him*] died at [*place*], on [*date*], and had at the time of his death his ordinary or principal domicile in the county of Edinburgh [*or, as the case may be*].

2. An inventory of the personal estate of the said D. was given up, and recorded in the Court Books of the Commissariot of Edinburgh on [*date*], and confirmation thereof expedite on [*date*], in favour of B. [*design him*],

as executor-dative *qua* next of kin [*or other character*] to the said D. [*or, as executor-nominate of the said D. under his settlement (describe it)*].

3. There was omitted from said confirmation certain estate belonging to the said D. [and certain items of estate, though included, were undervalued therein] to which omitted estate [and to the omitted value of said items] it is necessary that a title should now be made up by confirmation in order to uplift and discharge the same.

4. The said B. is now deceased, and the petitioner is a son and next of kin of the said D. [*or other title, as the case may be*].

5. In respect the executor already confirmed as aforesaid is now deceased no special intimation of this petition is necessary.

#### NOTE OF PLEA IN LAW.

Certain personal estate of the said D. still remaining unconfirmed, the petitioner being his next of kin [*or other title, as the case may be*], is entitled to be decerned his executor-dative *ad omissa* [*et male appretiated*].

[*To be signed by the Petitioner or his Law Agent,  
who shall add his address.*]

### 52. PETITION FOR APPOINTMENT AS EXECUTOR-DATIVE *ad non executa.*

Commissariot of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians and Peebles,  
at Edinburgh,

A. [*design him*],—Petitioner;

The above named petitioner submits to the Court the condescendence and note of plea in law hereto annexed, and prays the Court,—

To decern the petitioner executor-dative *ad non executa qua* legatee [*or, next of kin, or other title, as the case may be*] to the deceased D., after designed.

#### CONDESCENDENCE.

1. The late D. [*design him*], died at [*place*], on [*date*], and had at the time of his death his ordinary or principal domicile in the county of Edinburgh [*or, as the case may be*].

2. An inventory of the personal estate of the said D. was given up and recorded in the Court Books of the Commissariot of Edinburgh on [*date*], and confirmation thereof expedite on [*date*], in favour of B. [*design*

him], as executor-nominate of the said D. under his settlement [*describe it*]; [or, as executor-dative *qua* relict [or, next of kin, &c.], decerned to him on [date]], but the said B. has died leaving part [or, the whole] of the estate confirmed by him untransferred to the persons entitled thereto, part thereof being still unuplifted and part uplifted and reinvested or remaining in the said executor's hands [*as the case may be*]. And it is necessary that a title should now be made up by the appointment of an executor *ad non executa* to continue and complete the administration of the estate contained in said confirmation.

3. The petitioner is a son and next of kin of the said D.: [or, a legatee of the said D. under his will produced, or *other title, as the case may be*].

4. In respect the executor already confirmed is now deceased no special intimation of this Petition is necessary.

#### NOTE OF PLEA IN LAW.

The confirmation to the personal estate of the said D. having become inoperative by the death of the executor, the petitioner is entitled to be decerned executor-dative *ad non executa*.

[To be signed by the Petitioner or his Law Agent,  
who shall add his address.]

#### 53. PETITION FOR RECALL OF DECREE-DATIVE AND TO BE SUBSTITUTED OR CONJOINED IN THE APPOINTMENT AS EXECUTOR.

Commissariat of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians and Peebles,  
at Edinburgh,

A. [*design him*],—Petitioner;

The above named petitioner submits to the Court the condescendence and note of plea in law hereto annexed, and prays the Court,—

To direct intimation of this petition to be made to B., after designed, by service of a full double thereof, and thereafter to recall the decree-dative in her favour after mentioned, and to decern the petitioner as executor-dative *qua* next of kin to the deceased D., after designed; or, otherwise, to conjoin this petition with the petition at the instance of the said B., and to decern both petitioners executors-dative *qua* next of kin to the said D.

## CONDESCENDENCE.

1. The late D. [*design him*] died at [*place*], on [*date*], and had at the time of his death his ordinary or principal domicile in the county of Edinburgh [*or as the case may be*].

2. On a petition presented in the said Sheriff Court at Edinburgh by B. [*design her*], sister of the said defunct, the said B. was on [*date*] decerned executor-dative *qua* next of kin to the said D., but she has not yet extracted said decree or expedie any confirmation thereon.

3. The petitioner is a brother of the said D., who died without issue, and is thus also one of his next of kin.

## NOTE OF PLEA IN LAW.

The petitioner being one of the next of kin of the said D. is entitled to have the decerniture in favour of his sister recalled, and to be substituted for or conjoined with her in the office of executor-dative to the said D.

*[To be signed by the Petitioner or his Law Agent,  
who shall add his address.]*

#### 54. PETITION FOR APPOINTMENT OF FACTOR FOR MINOR AND PUPIL NEXT OF KIN ON EXECUTRY ESTATE.

Commissariat of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians and Peebles,  
at Edinburgh,

A. [*design him*], who is in minority, and B. [*design him*], who is in pupillarity, children and next of kin of D., after designed, along with C., E., F., and G. [*design them*].—Petitioners;

The above named petitioners submit to the Court the condescendence and note of plea in law hereto annexed, and pray the Court,—

To appoint the said C. factor for the said A. and B. on the executry estate of the said D., with power to have himself decerned and confirmed as executor-dative to the said D. *qua* factor foresaid, for behoof of the said minor and pupil children and of all interested in said estate, on his finding caution for his introductions therewith, and that the same shall be made forthcoming to the said minor and pupil children and all interested in common form; or to do further or otherwise in the premises as to the Court may appear right and proper.

## CONDESCENDENCE.

1. The late D. [*design him*] died at [*place*], on [*date*], and had at the time of his death his ordinary or principal domicile in the county of Edinburgh [*or as the case may be*].

2. The said A. and B. are the only children and next of kin of the said D., and entitled to be his executors, but the said A. being in minority, and the said B. in pupillarity, they have not the *status* which would qualify them in their own names to administer the personal estate of the said D.; and having no tutors, or curators, or other legal guardians, it is necessary that a factor be appointed for them on said estate to administer the same for behoof of said children and all interested.

3. The mother of the said A. and B. predeceased their father, and the petitioners C. and E. are the paternal uncle and aunt, and the petitioners F. and G., the maternal uncles of the said A. and B.

4. The petitioners respectfully suggest to the Court that the said C. is a fit and proper person to be appointed to the office of factor, he being willing to undertake the duties thereof.

## NOTE OF PLEA IN LAW.

The petitioners A. and B. being the minor and pupil next of kin of the said D., and having no legal guardians, are entitled to have a factor appointed for them on the executry estate of the said D.

[*To be signed by the Petitioners or by their Law Agent,  
who shall add his address.*]

## 55. PETITION FOR RESTRICTION OF CAUTION.

Commissariat of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians and Peebles,  
at Edinburgh,

A. [*design him*],—Petitioner;

The above named petitioner submits to the Court the condescendence and note of plea in law hereto annexed, and prays the Court,—

To appoint intimation of this application to be made in such newspapers as to the Court may seem meet, and thereafter to restrict the caution to be found by the petitioner, as after mentioned, to the sum of £       , or to such other sum as to the Court shall seem proper.

## CONDESCENDENCE.

1. The late D. [*design him*] died at [*place*], on [*date*], and had at the time of his death his ordinary or principal domicile in the county of Edinburgh [*or as the case may be*].

2. The petitioner was decerned executor-dative *qua* to the said D. on [*date*], and has since prepared and given up an inventory of his personal estate amounting in value to £ , and craved confirmation thereof.

3. Before confirmation can be expedite, the petitioner requires to find caution for his intromissions as executor foresaid, but he is unable to do so to the full amount of the inventory, not having any friends who are in circumstances to become responsible for the same, and, therefore, makes this application to the Court to have the amount for which he shall be required to find caution restricted.

4. The debts left due by the said D., together with his funeral expenses, have already been discharged by the petitioner, and the petitioner is his sole next of kin and the only person beneficially interested in the estate of the said D. ;

or,

4. The amount of the debts left due by the said D. and his funeral expenses will not exceed £ . The parties beneficially interested in the residue of his estate are his widow B. ; his three surviving children—viz., the petitioner, E., and F. ; and the children of C, a daughter of the said D., who predeceased him—viz., G. and H. The said B. and E. consent to this application being granted. The consent of the said F. cannot be obtained in consequence of his residence abroad. The said G. and H. are in minority, but their father I., as their administrator-in-law, also consents.

## NOTE OF PLEA IN LAW.

It being competent for the Court to fix the caution to be found by the petitioner, he is entitled, in the circumstances of this case, to have the same restricted as craved.

[*To be signed by Petitioner or by his Law Agent,  
who shall add his address.*]

## FORM OF CONSENT.

We consent to the prayer of the foregoing petition being granted.

[*Or if a separate paper.*]

We hereby consent to the caution to be found by A. in the confirmation to be expedite by him as executor of the late D. being restricted to the sum of £ .

## FORM OF INTIMATION IN NEWSPAPERS.

Commissariat of Edinburgh.

INTIMATION.—A petition having been presented to the Sheriff of the Lothians and Peebles at Edinburgh by A. [*name and designation*], craving that the caution to be found by him as executor-dative *qua* next of kin [*or other character*] to D. [*name and designation*], may be restricted to the sum of £ , any person having objections thereto has been ordained to lodge the same with the Commissary Clerk within ten days from the date of this advertisement.

[Signed by Petitioner or his Agent.]

## 56. PETITION FOR WARRANT TO ACCEPT A PUBLIC COMPANY AS CAUTIONER.

Commissariat of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians and Peebles,  
at Edinburgh,

A. [*design him*],—Petitioner ;

The above named petitioner submits to the Court the condescendence and note of plea in law hereto annexed, and prays the Court,—

To grant warrant to the Commissary Clerk to accept a bond of caution by the [*name of Company*] for the petitioner, as executor-dative of the deceased D., after designed.

## CONDESCENDENCE.

1. The late D. [*design him*] died at [*place*], on [*date*], and had at the time of his death his ordinary or principal domicile in the county of Edinburgh [*or as the case may be*].

2. The petitioner was decerned executor-dative *qua* to the said D. on [*date*], and has since prepared and given up an inventory of his personal estate, amounting in value to £ , and craved confirmation thereof.

3. Before confirmation can be expedite the petitioner requires to find caution for his intromissions as executor foresaid, but he knows no private individual resident in Scotland whom he can offer as cautioner, and he therefore tenders [*name of Company*], which has its head office [*or, a branch office*] in Scotland, as cautioner for him. A copy of the last balance-sheet of said Company, with the names of the directors and officials thereof, is herewith produced.

## PLEA IN LAW.

In the circumstances set forth the petitioner is entitled to warrant as craved.

[*To be signed by Petitioner or by his Law Agent,  
who shall add his address.*]

## 57. PETITION FOR WARRANT TO SEAL REPOSITORIES.

Commissariat of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians and Peebles,  
at Edinburgh,

A. [*design him*],—Petitioner;

The above named petitioner submits to the Court the condescence and note of plea in law hereto annexed, and prays the Court,—

To grant warrant to the Commissary Clerk or his assistants to repair to the dwelling-house of the deceased D., after designed, and to cause seal up his repositories with the Seal of Court, to remain thereon until the said D. is interred, and thereafter to remove the seals, and to take inventory of what cash, papers, or effects may be found therein, as also to make inventory of the deceased's household furniture and other effects, all in order to confirmation.

## CONDESCENCE.

1. The late D. [*design him*] died this morning at [*place*], having his ordinary or principal domicile in the county of Edinburgh.

2. The petitioner is a son of the said D., but does not know whether his father has left any settlement, or how his affairs may turn out, and whether or not there will be sufficient funds to pay debts.

## NOTE OF PLEA IN LAW.

It being competent for the Court to grant said warrant, it is proper in the circumstances above set forth that it should be granted.

[*To be signed by the Petitioner or his Law Agent,  
who shall add his address.*]

# 58. PETITION FOR WARRANT TO EXAMINE REPOSITORIES AND SECURE EFFECTS.

Commissariot of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians and Peebles,  
at Edinburgh,

A. [*design him*],—Petitioner ;

The above named petitioner submits to the Court the condescendence and note of plea in law hereto annexed, and prays the Court,—

To grant warrant to the Commissary Clerk, or his assistants, to open and examine the repositories after mentioned of the deceased D., after designed, particularly with the view of ascertaining whether he has left any settlement of his affairs ; to take possession of any money, papers, or effects, or such part thereof as it may appear necessary and proper to remove for safe custody, and to hold the same, subject to future orders of Court ; to secure the property and premises of the said D. as may appear necessary and expedient in the meantime ; and to report proceedings to the Court ;—and thereafter to grant such further orders for the custody and disposal of the said money, papers, property, and effects as to the Court may seem proper.

## CONDESCENDENCE.

1. The late D. [*design him*] died at [*place*], on [*date*], and had at the time of his death his ordinary or principal domicile in the county of Edinburgh.

2. The said D. is believed to have left considerable personal estate, but it is not known whether he has left any settlement, or has appointed executors. His next of kin are his nephews and nieces, most of whom are resident abroad, and as there is no one with a title to take charge of his affairs, it has been considered desirable to make this application.

3. The said D. carried on business as a [*trade or profession*], at [*place*], and resided in furnished lodgings at [*place*], in both of which places he has left papers and effects, which it is necessary to examine and secure.

4. The petitioner is a nephew and one of the next of kin of the said D. [*or state what other interest the petitioner has to make the application*].

## NOTE OF PLEA IN LAW.

It being competent for the Court to grant said warrant, it is proper, in the circumstances, that it should be granted.

[*To be signed by the Petitioner or his Law Agent,  
who shall add his address.*]

**59. MINUTE BY EXECUTORS-DATIVE FOR RECALL OF DECREE—**

- (1.) WHERE AVERMENTS IN PETITION FOUND TO BE ERRONEOUS;
- (2.) WHERE DECREE-DATIVE FOUND TO BE UNNECESSARY;
- (3.) WHERE ONE OF THE EXECUTORS DECERNED HAS DIED; OR,
- (4.) WHERE ONE OF THE EXECUTORS DECERNED DESIRES TO WITHDRAW BEFORE CONFIRMATION.

[*Written on Petition.*]

(1.)

The petitioner [*or, his agent*] stated that in the foregoing petition the name of the petitioner [*or, of the deceased*] had been *per incuriam* erroneously written instead of [*or otherwise, describe the error*], and craved that the decerniture thereon might be recalled in order that a new petition might be presented.

[*Date.*]

[*Signed by Petitioner or Agent.*]

(2.)

The petitioner [*or, his agent*] stated that since the date of the foregoing decree-dative, it had been discovered to be unnecessary and incompetent, in respect that the deceased D. left a settlement, in which he appointed executors-nominate, who have accepted the office, and craved recall of said decree accordingly.

[*Date.*]

[*Signed by Petitioner or Agent.*]

(3.)

The petitioners A. and B. [*or, their agent*] stated that since the date of the decree-dative in favour of them, and of the petitioner C., the said C. had died, and craved that said decree should be recalled, and that the petitioners A. and B. should be of new decerned as executors-dative to the said deceased D.

[*Date.*]

[*Signed by A. and B. or Agent.*]

(4.)

The petitioners A., B., and C. [*or, their agent*] stated that since the date of the decree-dative in their favour, it had been arranged that confirmation should be issued in favour of A. and B. alone, and craved that the said decree should be recalled, and that the petitioners A. and B. should be of new decerned as executors-dative to the said deceased D.

[*Date.*]

[*Signed by Petitioners or Agent.*]

**60. CAVEAT AGAINST CONFIRMATION OR DECERNITURE.**

Commissariat of Edinburgh.

Caveat for A. [*design him*], one of the next of kin of the deceased D.,  
after designed [*or state interest in the deceased's estate*].

It is requested that if any application for confirmation to the late D. [*design him*], or any inventory of his personal estate, or any petition for the appointment of executor to the said D., should be lodged with the Commissary Clerk, intimation thereof may be sent to the subscriber.

[*Signed by Party or Agent.*]

*N.B.—Caveats fall on the expiry of three months.*

**61. NOTE OF OBJECTIONS TO CONFIRMATION BEING ISSUED.**

Commissariat of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians and Peebles,  
at Edinburgh,

Note of objections by A., B., and C. [*design them*], nephew and nieces  
and next of kin of the deceased D., after designed,

TO

The issuing of Confirmation in favour of E. as executor-nominate  
of the said D.

1. The said D. was at the time of his death—which occurred only ten days ago—upwards of eighty years of age, and for some years was in feeble health. He latterly lived with the said E., who had great influence over him, and who has now assumed the entire control of his affairs, and refused the objectors access to his repositories.

The will founded on is alleged to be holograph of the said D., but the objectors, who reside at a distance, have not had time to satisfy themselves that this is so, or whether there may not be other testamentary writings left by the deceased not exhibited by the said E. They have reason to believe that such writings exist, and object to confirmation being issued, at least until they have had full time and opportunity to make further inquiries in the matter.

[*Signed by Objectors or Agent.*]

**62. NOTE OF OBJECTIONS TO RESTRICTION OF CAUTION.**

Commissariat of Edinburgh.

In the Sheriff Court of the Sheriffdom of the Lothians and Peebles,  
at Edinburgh,

Note of Objections by A. [*design him or her*],

TO

The Restriction of Caution applied for by B. and C. [*design them*], sons  
and executors-dative *qua* next of kin of the deceased D. [*design him*].

The objector is a creditor of the said D. to the extent of £ ,  
for the payment of which he has no security, and objects to the amount of  
caution to be found by the said B. and C. as executors-dative foresaid  
being restricted, as craved in their petition [*or state any other grounds for  
opposing the restriction*].

[*Signed by Objector or Agent.*]

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**63. INVENTORY AND OATH THERETO WITH RELATIVE REVENUE  
STATEMENT. FORMS SUPPLIED BY INLAND REVENUE DEPARTMENT.  
*To be filled up in accordance with directions noted thereon.***

**FORM A—1\*.**

- (1.) For use *in all* cases where deceased died after 8th April 1900, *except*  
where Forms A—4 or B—1 may be applicable.

**FORM A—1.**

- (2.) For use where the deceased died after 1st August 1894, and before  
9th April 1900, *except* where Forms A—4 or B—1 may be  
applicable.

**FORM A—4.**

- (3.) For use where the deceased died after 1st August 1894, and the **WHOLE  
PROPERTY** liable to Estate Duty is **EXECUTRY ESTATE IN THE  
UNITED KINGDOM**, and *ad valorem* duty (if any) payable.

**FORM B—1.**

- (4.) For use where the deceased died after 1st August 1894, and **WHERE  
THE GROSS VALUE OF THE WHOLE PROPERTY, HERITABLE AND MOVEABLE,**  
liable to Estate Duty (*exclusive of property settled otherwise than by  
deceased's will*) **DOES NOT EXCEED £500**, and where the duty payable  
(if any) is the fixed duty of 30s. or 50s.

NOTE.—Where confirmation is desired under the Small Estates Acts, on application to the COMMISSARY OR SHERIFF CLERK of the county where the confirmation falls to be issued, or to any INLAND REVENUE OFFICER appointed for the purpose (page 328), the Form B will be filled up and confirmation issued for an inclusive fee not exceeding 15s.

Form B may also be used where the procedure under the Small Estates Acts is not adopted, but if the applicant is not entitled to confirmation as executor-nominate, the application must be preceded by a Petition for Decerniture, and the decerniture narrated in the oath.

(a.) WHERE SEALING OF COLONIAL GRANTS IS REQUIRED INSTEAD OF CONFIRMATION.

“That a Grant of Probate of the Will [*or Letters of Administration, or Letters of Administration with the Will annexed*] of the said deceased [*name*] was made to me [*or where the oath is taken by an Attorney or Mandatory for the executor or administrator, to the said executor or administrator*] by the [*name of Court by which the Grant has been made*] on [*date of Grant*], which Probate [*or Letters, &c., or a duplicate, or duly certified copy thereof*] is now exhibited and signed by the deponent and the said as relative hereto. And a full copy thereof is also produced herewith.” And instead of craving for confirmation, the oath will conclude thus: “And it is now required that said Probate [*or Letters, &c.*] should be sealed with the seal of the Commissariat of Edinburgh in terms of the Colonial Probates Act, 1892, and relative Rules of Court dated 9th June, 1893.—All which is truth,” &c.

(b.) WHERE TRUSTEES AND EXECUTORS HAVE BEEN ASSUMED.

That the deponent is executor-nominate of the said [*name of deceased*], who by trust-disposition and settlement [*describe it and any other testamentary writings relating to the appointment of executors*] herewith exhibited and signed by the deponent and the said as relative hereto, nominated A., B., and the deponent, and such other persons as might be assumed as trustees under the said trust-disposition and settlement, to be his executors. That the said A. predeceased the testator, and the said B. declined to accept. That the deponent by deed of assumption [*describe it*], also herewith exhibited and signed as relative hereto, assumed D. and E. [*names and designations*] as trustees [*or, as trustees and executors*] under the said trust-disposition and settlement. That the deponent, along with the said D. and E. trustees, and as such executors foresaid, have entered upon the possession and management of the deceased's estate.

## (c.) AFFIRMATION INSTEAD OF OATH.

At Edinburgh, the                      day of                      , 19    , in presence of

Appeared A. B., who objected to being sworn, and stated as the ground of such objection that he has no religious belief [*or, that the taking of an oath is contrary to his religious belief*], and who made his solemn affirmation as follows:—I do solemnly and sincerely affirm, That the said died, &c. [the averments being made in the first person].—All which is truth.

Affirmed at Edinburgh this                      day of                      , 19    .  
Before me,

## (d.) SUPPLEMENTARY OR ADDITIONAL OATH.

At Edinburgh, the                      day of                      , 19    , in presence of

Appeared                      , who being solemnly sworn and examined, depones, That since the foregoing deposition was made, A. B., who is therein mentioned as one of the accepting and acting executors of the deceased, has died [*or, has resigned*]; *or*, that an additional testamentary writing [*describe it*] has been discovered and is herewith exhibited and signed as relative hereto; or otherwise as the case may be. [*Should this deposition be made by a different executor, add, That except as herein specified the deponent concurs in omnibus with the preceding deposition.*].—All which is truth, as the deponent shall answer to God.

## (e.) OATH TAKEN BY ATTORNEY FOR EXECUTOR ABROAD.

At Edinburgh, the                      day of                      , 19    , in presence of

Appeared                      , attorney for [*name and description*], conform to power of attorney herewith exhibited and signed by the deponent and the said                      as relative hereto, who being solemnly sworn, &c. [*Confirmation being craved in favour of the executor.*]

## DOCQUET ON DEEDS EXHIBITED.

[*Place and date.*].—Referred to in my deposition of this date to the Inventory of the personal estate of the deceased [*name*].

**64. ACCOUNT OF PERSONAL ESTATE IN RESPECT OF WHICH A GRANT OF PROBATE OR LETTERS OF ADMINISTRATION MAY BE MADE IN ENGLAND.**

				Market Price of Stocks at date of death.	Principal Gross Value at date of death.		
					£	s.	d.
Stocks or Funds (including Exchequer Bills) of the United Kingdom, viz. :—	£	s.	d.				
Stocks, Funds, or Bonds of Foreign Countries or of British Dependencies and Colonies <i>transferable in the United Kingdom</i> , viz. :—							
Shares or Debentures of Public Companies, . . .							
Dividends and Interest declared and accrued due on the above investments to date of death, . . . .							
Cash in the House, . . . . .							
Cash at the Bankers {							
1. On Drawing Account, viz., at							
2. On Deposit, viz., at							
3. In the Savings Bank,							
Money out on Mortgage and Interest thereon to date of death,							
Money out on Bonds, Bills, Notes, and Interest thereon to date of death, . . . . .							
Book Debts due to deceased, . . . . .							
Other Debts due to deceased, as <i>per</i> list annexed, . . . . .							
Unpaid Purchase money of Real and Leasehold Property <i>contracted</i> in lifetime of deceased to be sold, . . . . .							
*Deceased's Interest in sale of Real Estate directed to be sold by Settlement or by Will of some other person, whether sold or not, estimated at . . . . .							
*Personal Estate over which the deceased had and exercised an absolute power of appointment, . . . . .							
Policies of Insurance on Life of deceased and Bonuses, . . . .							
*Surrender value of Policies (and Bonuses) on the life of any other person, . . . . .							
Household Goods, Pictures, China, Apparel, Books, Plate, Jewels, &c., . . . . .							
If sold, realised gross, £							
If unsold, estimated at £							

\* Full particulars of Deeds, Wills, names, dates, and values must be given.

	£	s.	d.
Stock-in-Trade, Live and Dead Farming Stock, Implements of Husbandry, &c., . . . . .			
If sold, realised gross, £ . . . . .			
If unsold, estimated at £ . . . . .			
Goodwill of Business, if taken over at a price, £ . . . . .			
If valued according to custom of Trade, £ . . . . .			
If neither, estimated at, viz., . . . . . years' purchase of net profits, . . . . .			
Profits of Business from . . . . . to date of death, . . . . .			
Ships and Shares of Ships registered at Ports in the United Kingdom, and profits of same to date of death, estimated at The Deceased's Share in Real and Personal Property as a Partner in the Firm of . . . . .			
as per balance-sheet signed by the surviving Partners, . . . . .			
If none, estimated at . . . . .			
Leasehold Property—			
Situate at, . . . . .			
Unexpired term . . . . . years, . . . . .			
Gross Rent, . . . . . £ . . . . .			
Ground Rent, . . . . . £ . . . . .			
Other yearly Outgoings, . . . . . £ . . . . .			
Value of the property, estimated at . . . . . £ . . . . .			
Less a Mortgage Debt of, . . . . . £ . . . . .			
due from the Deceased, and created by an Indenture dated the . . . . . day of . . . . ., for which the said Leasehold Property is the sole security.			
Rents of the Deceased's own Real and Leasehold Property due prior to the death, but not received by the Deceased, estimated at . . . . .			
Apportionment of Rents of Deceased's Real and Leasehold Property to date of death estimated at . . . . .			
Income accrued due, but not received prior to the death, arising from Real and Personal Property, of which the Deceased was Tenant for Life or for any less period, viz. :—			
Apportionment of such Income to the date of death, . . . . .			
The Deceased's Interest expectant upon the death of . . . . .			
now aged . . . . . years, under the Will of . . . . . proved . . . . .			
or under the Settlement dated . . . . . made on the Marriage of . . . . . between . . . . . and dated . . . . . in the Property set out in the exhibit annexed, and of which Fund the present Trustees are—			
Friendly Society, Club, Building Society, viz., . . . . .			
Other property not comprised under the foregoing heads, . . . . .			
Gross value, . . . . . £ . . . . .			

**65. ADDITIONAL AND CORRECTIVE INVENTORY; AND OATH THERETO, WHERE THE DECEASED DIED AFTER 1st AUGUST 1894. FORMS SUPPLIED BY INLAND REVENUE. To be filled up in accordance with instructions noted thereon.**

**FORM D—1\*.**

(1.) For use where the deceased died *on or after 9th April 1900* for all Additional Inventories, and Inventories *ad omissa vel male appretiateda*.

**FORM D—1.**

(2.) For use where the deceased died *after 1st August 1894 and before 9th April 1900* for all Additional Inventories and Inventories *ad omissa vel male appretiateda*.

*Clause craving Confirmation.*

**(1.) WHERE AN EIK TO CONFIRMATION REQUIRED.**

That confirmation of the additional estate now given up is required in favour of the deponent along with A. and B. [*names and designations*], the other executors in whose favour the original confirmation was granted [*or, in favour of the deponent, A. and B., the other executors previously confirmed having ceased to act, the said A. having resigned and the said B. being now deceased; or, in favour of the deponent, and C. and D. [names and designations]*], whom the deponent has assumed to act along with him as executors-nominate of the said deceased, conform to Deed of Assumption [*describe it*] herewith exhibited and signed as relative hereto].—All which is truth, &c.

**(2.) WHERE CONFIRMATION *ad omissa vel male appretiateda* REQUIRED.**

That the executors in whose favour the original confirmation was granted are now deceased. That confirmation *ad omissa* is now required in favour of the deponent as substitute executor-nominate under [*describe Deed*] recorded in the Court Books of the Commissariat of Edinburgh on [*date*], [*or, as executor-dative ad omissa qua next of kin [or other title] decerned in the Sheriff Court of Edinburgh on [date]*].—All which is truth, &c.

**66. ADDITIONAL (AND CORRECTIVE) INVENTORY; AND OATH THERETO, WHERE THE DECEASED DIED BEFORE 2ND AUGUST 1894.**

ADDITIONAL (AND CORRECTIVE) INVENTORY of the Personal Estate wheresoever situated (and of the Money secured by Scottish Bonds and other Instruments, excluding Executors, *if any*), of the deceased, who died at , on the day of 18 .

Amount of the personal estate given up in the original inventory of the deceased's estate, recorded in the Court Books of the Commissariat of Edinburgh, on £  
(*Gross, not net estate.*)

**SCOTLAND.**

**ESTATE UNDERVALUED.**

The deceased's interest in the estate of under his settlement

[*describe it*], as now ascertained, . £

Valued in the original inventory at .

Difference, . . . . £

**ENGLAND.**

**EFFECTS OMITTED.**

Deposit receipt [*describe it*], . £

Interest to date of oath, . . . .

Amount of additional estate, . . . . £

[*If the inventory is corrective as well as additional, the items overestimated or erroneously included in the original inventory will be entered here, and the amount deducted from the total estate given up as above brought out.*]

Total (corrected) amount of personal estate in the United Kingdom, . . . . £

[*Add money secured on bonds, etc., excluding executors, given up in the original inventory (if any) and any addition to such money*], . . . .

Total amount of personal estate in the United Kingdom and money secured on heritage, etc., in Scotland, . . £

**SCHEDULE OF DEBTS Due and Owing from the Deceased at the time of his Death to Persons resident in the United Kingdom, and Funeral Expenses :—**

Amount thereof contained in schedule to original inventory [if any], . . . . . £			
[Insert debts or funeral expenses not previously deducted], .			
Total amount of debts and funeral expenses, . . . . £			

**ABSTRACT.**

Total amount of personal estate, as per foregoing inventory, £			
Amount of debts and funeral expenses, as per schedule, .			
Net value of personal estate chargeable with duty, . . £			
[Add money secured on bonds, etc., excluding executors, if any],			
Total amount of estate chargeable with duty, . . . . £			

NOTE.—Inventory duty on the value [if debts have been deducted, on the net value] of the estate as above [including money on bonds, etc., excluding executors, if any], . . £			
The duty paid on the former inventory, . . . . .			
The duty on the additional inventory, . . . . . £			

**(1.) OATH, WHERE THE WHOLE DEBTS HAVE ALREADY BEEN DEDUCTED.**

At , the day of , one thousand  
nine hundred and

In presence of

Appeared , executor-nominate [or, dative] of the said deceased , who being solemnly sworn and examined, depones,—That the said died at , domiciled in Scotland, on : That the foregoing is an additional (and corrective) inventory of the personal estate of the said deceased as ascertained and discovered since the day of , when the original inventory of the deceased's estate was recorded in the Court Books of the Commissariat of Edinburgh : That the deponent has not discovered any other estate and effects belonging to the deceased : That the said inventory, which is signed as relative hereto, is a full and true inventory of all the personal or moveable estate or effects of the said deceased , wheresoever situated, already recovered, or known to be existing, belonging or due to him beneficially at the time of his death [and money secured by Scottish bonds and other instruments, excluding executors, if any], in so far as the same has come to the deponent's

knowledge [or, that the deponent does not know of any money or property belonging to the said , secured by Scottish bonds or other instruments, excluding executors; or, that the money or property belonging to the said , secured by Scottish bonds or other instruments, excluding executors, is not accounted for in this inventory]: That the net value at this date of the said personal estate and effects situated in Scotland [or, in the United Kingdom, *if English or Irish estate is included*] [and of the said money, *if any*], including the proceeds accrued on the additional estate given up in this inventory down to this date, and after deducting the amount of the debts and funeral expenses is                      pounds sterling, and under                      pounds sterling: That confirmation of the additional personal estate given up in this inventory is required in favour of                      [or, That no further confirmation is in the meantime required].—All which is truth, as the deponent shall answer to God.

*Where estate or additional estate duty (temporary), has become payable, the following NOTE is to be put upon the inventory and signed by the Agent exhibiting it in the Sheriff Court:—*“There is herewith delivered a statement, duly stamped, of the personal estate herein contained, as required by the Act 52 Vict. c. 7, § 5.”

(2.) OATH, WHERE DEBTS OR ADDITIONAL DEBTS ARE DEDUCTED.

*[Same as the preceding Form, except that before the clause setting forth the net value, insert]—*

That the said deceased was due and owing at the time of his death to persons resident in the United Kingdom the debts enumerated in the foregoing schedule: That these debts are payable by law out of the estate and effects comprised in the foregoing inventory; are not, nor any of them, voluntary debts made payable on the death of the deceased, or voluntary debts payable under some instrument delivered to the donee thereof within three months before the death of the deceased, or debts which are primarily payable out of any real estate belonging to the deceased, or debts in respect whereof a reimbursement is capable of being reclaimed from any real estate of the deceased or from any other estate or person whatsoever: That these debts, with the funeral expenses of the said deceased, as also shown in the said schedule, amount to                      pounds                      shillings and                      pence.

(3.) OATH, WHERE NO DEBTS ARE OR HAVE BEEN DEDUCTED.

*[Same as the preceding Form (1.) except that in the clause deponing to the value of the estate omit the words “net” and “and after deducting the amount of the debts and funeral expenses.”]*

**67. INVENTORY *ad omissa* [*et male appretiata*] AND OATH THERETO,  
WHERE THE DECEASED DIED BEFORE 2nd AUGUST 1894.**

INVENTORY of the personal estate *ad omissa* (*et male appretiata*) [and of the money secured by Scottish bonds and other instruments, excluding executors (*if any*)] of the deceased                      who died at                      on the  
day of                      18 .

[*The entries in this inventory are in the same form as in an additional inventory, Form 66.*]

**(1.) OATH, WHERE THE WHOLE DEBTS HAVE ALREADY BEEN DEDUCTED.**

At                      the                      day of                      , one thousand  
nine hundred and  
In presence of

Appeared                      , executor-dative *ad omissa* (*et male appretiata*) [*or*, substitute executor-nominate] of the said deceased                      , who, being solemnly sworn and examined, depones,—That the said                      died at                      , domiciled in Scotland, on                      : That an inventory of the deceased's personal estate was given up and recorded in the Court Books of the Commissariat of Edinburgh on                      , and confirmation thereof expedite on                      , by                      as executor-dative *qua* [*or*, as executor nominated by the said deceased                      under a settlement (*describe it*): That there was omitted from [and undervalued in] said inventory and confirmation, certain estate and effects, as specified in the foregoing inventory *ad omissa* (*et male appretiata*): That the said                      is now deceased, and the deponent has been decerned in the Sheriff Court of Edinburgh, on                      , as executor-dative foresaid *qua* to the said                      [*or*, that the deponent is substitute executor-nominate under said settlement], and is about to enter on the possession and management of said estate: That the deponent has not discovered any other estate or effects belonging to the deceased                      : That the foregoing inventory, which is signed as relative hereto, is a full and true inventory of all the personal and moveable estate or effects of the said                      wheresoever situated, already recovered or known to be existing, belonging, or due to him beneficially at the time of his death [and money secured by Scottish bonds or other instruments excluding executors, *if any*], in so far as the same has come to the deponent's knowledge; [*or*, that the deponent does not know of any money or property belonging to the said                      secured by Scottish bonds or other instruments excluding executors; *or*, that the money or property belonging to the said                      secured by Scottish bonds or other instruments exclud-

ing executors is not accounted for in this inventory]: That the net value at this date of the said personal estate and effects situated in Scotland [or, in the United Kingdom, *if English or Irish estate is included*], [and of the said money, *if any*], including the proceeds on the estate *ad omissa et male appretiateda* now given up down to this date, and after deducting the amount of the debts and funeral expenses is                      pounds sterling, and under                      pounds sterling: That confirmation *ad omissa (et male appretiateda)* is required in favour of the deponent.—All which is truth, as the deponent shall answer to God.

*Where estate, or additional estate duty (temporary) has become payable, the following NOTE is to be put upon the inventory and signed by the Agent exhibiting it in the Sheriff Court :—*“There is herewith delivered a statement, duly stamped, of the personal estate herein contained, as required by the Act 52 Vict. c. 7, § 5.”

(2.) OATH, WHERE DEBTS OR ADDITIONAL DEBTS ARE DEDUCTED.

[*Same as the preceding Form, except that before the clause setting forth the net value, insert*]—

That the said deceased                      was due and owing at the time of his decease to persons resident in the United Kingdom the debts enumerated in the foregoing schedule: That these debts are payable by law out of the estate and effects comprised in the foregoing inventory; are not, nor any of them, voluntary debts made payable on the death of the deceased or voluntary debts payable under some instrument delivered to the donee thereof within three months before the death of the deceased, or debts which are primarily payable out of any real estate belonging to the deceased, or debts in respect whereof a reimbursement is capable of being reclaimed from any real estate of the deceased, or from any other estate or person whatsoever: That these debts, with the funeral expenses of the said deceased, as also shown in the said schedule, amount to                      pounds,                      shillings, and                      pence.

(3.) OATH, WHERE NO DEBTS ARE OR HAVE BEEN DEDUCTED.

[*Same as the preceding Form (1.) except that in the clause deponing to the value of the estate omit the words “net,” and “and after deducting the amount of the debts and funeral expenses.”*]

68. INVENTORY *ad non executa*; AND OATH THERETO.

INVENTORY of the Personal Estate *ad non executa* of the Deceased  
 , who died at , on (date).

Amount of the personal estate given up in the original Inventory of the deceased's estate recorded in the Court Books of the Commissariat of , on (date), and of which confirmation was expedite on (date), in favour of A. and B. as executors of the said deceased, the said A. and B. being both also now deceased, . . . . . £

ESTATE AD NON EXECUTA.

## SCOTLAND.

1. Estate unlifted and still *in bonis* of the deceased :—  
 viz. :—
2. Estate transferred to and standing in name of the said A. and B. as executors :—  
 viz. :—
3. Estate recovered by the executors, but not transferred to the persons entitled thereto :—  
 ; viz. :—

## ENGLAND.

[Specify Estate as above.]

£

NOTE.—The estate now given up having already been included in an inventory on which the duty was fully paid, no further duty is payable.

At , the day of , One thousand nine hundred and .

In presence of appeared  
 substitute executor-nominate [or, executor-dative] *ad non executa* of the said deceased , who, being solemnly sworn and examined, depones,—That the said died at  
 on , domiciled in Scotland: That an Inventory of the personal estate of the said deceased was given up and recorded in the Court Books of the Commissariat of Edinburgh, on , and confirmation thereof expedite on , in favour of A. and B., as executors-nominate of the said deceased under settlement [describe it] [or as executors-dative *qua* next of kin (or as the case may be)]: That the said executors are now deceased, without having completed the administration of the estate contained in said confirmation: That the deponent is,

under the said settlement, entitled to confirmation as executor-nominate, failing the said A. and B. (*narrate title as substitute or assumed trustee, general disponent, universal legatory, or residuary legatee*) [or, that the deponent has been deputed in the Sheriff Court of Edinburgh, on

, as executor-dative *ad non executa* qua next of kin to the said deceased ]: That the deponent has not discovered any estate or effects belonging to the said deceased , other than the estate and effects contained in the Inventory given up and recorded as aforesaid: That confirmation of the estate *ad non executa* given up in the foregoing Inventory is now required in favour of the deponent.—All which is truth, as the deponent shall answer to God.

### 69. CORRECTIVE ADDITIONAL INVENTORY ; AND OATH THERETO.

#### (1.) WHERE ESTATE HAS BEEN WRONGLY DESCRIBED IN ORIGINAL INVENTORY.

CORRECTIVE ADDITIONAL INVENTORY of the Personal Estate of the  
deceased who died at on the  
day of 19 .

Amount of the personal estate given up in the original inventory of the deceased's estate, recorded in the Court Books of the Commissariat of Edinburgh on , £

Deduct value of the undermentioned estate erroneously described in said inventory, . . . . .

£

ENGLAND.

EFFECTS OMITTED.

£100 stock of the North Eastern Railway Company (erroneously given up in original inventory as estate in Scotland) value as at date of oath to original inventory, when duty paid, . . . . .

£


NOTE.—The estate chargeable with duty being the same as in the original inventory, no further duty is payable.

At , the day of , one thousand nine hundred and .

In presence of

Appeared executor-nominate [or, dative] of the said deceased , who being solemnly sworn and examined, depones,

—That the said deceased died at \_\_\_\_\_ domiciled in Scotland, on \_\_\_\_\_ : That the foregoing is a corrective additional inventory of the personal estate of the said deceased, as ascertained and discovered since the \_\_\_\_\_ day of \_\_\_\_\_, when the original inventory of the deceased's estate was recorded in the Court Books of the Commissariat of Edinburgh: That the deponent has not discovered any other estate or effects belonging to the deceased: That the said inventory, which is signed as relative hereto, is a full and complete inventory of the personal estate and effects of the said deceased \_\_\_\_\_ wheresoever situated, already recovered or known to be existing belonging or due to him beneficially at the time of his death, in so far as the same has come to the deponent's knowledge: And confirmation of the estate given up in this corrective additional inventory is required in favour of \_\_\_\_\_.—All which is truth, as the deponent shall answer to God.

(2.) WHERE THE ONLY ADDITIONAL ESTATE DISCOVERED CONSISTS OF FUNDS HELD BY THE DECEASED AS SOLE OR LAST SURVIVING TRUSTEE OR EXECUTOR-NOMINATE.

CORRECTIVE ADDITIONAL INVENTORY of the Personal Estate of the deceased \_\_\_\_\_ who died at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_

Gross amount of the personal estate given up in the original inventory of the deceased's estate recorded in the Court Books of the Commissariat of Edinburgh on \_\_\_\_\_, and of which confirmation was granted on \_\_\_\_\_, £

EFFECTS OMITTED.

It has been ascertained since the original inventory was given up and confirmation granted that the funds specified in the note appended hereto, were held by the deceased as a last surviving trustee [or, executor-nominate]. No additional estate has been discovered belonging beneficially to the deceased, but for the purpose of obtaining confirmation of an inventory with said note of funds held by him in trust annexed, his estate already confirmed is held not to exceed the nominal additional value of \_\_\_\_\_ . . . £

5	0	0

NOTE.—Trust Funds.

(Describe them and where situated.)

NOTE.—The value of the additional estate being merely nominal no further duty is payable.

OATH BY EXECUTOR-NOMINATE in same terms as above, 69 (1).

**70. OATH FOR CONFIRMATION AFTER INVENTORY HAS BEEN  
RECORDED.**

At \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, one thousand  
 nine hundred and \_\_\_\_\_.

In presence of \_\_\_\_\_

Appeared \_\_\_\_\_, executor-nominate [*or, dative*] of the deceased  
 \_\_\_\_\_, who, being solemnly sworn and examined, depones,—That  
 the said deceased \_\_\_\_\_ died at \_\_\_\_\_, on \_\_\_\_\_ : That an  
 inventory of the personal estate and effects of the said deceased  
 was given up and recorded in the Court Books of the Commissariat of  
 Edinburgh on the \_\_\_\_\_ day of \_\_\_\_\_, but no confirmation was  
 then required or has since been expede: That the deponent has not  
 discovered any other personal estate or effects belonging to the deceased :  
 That the said inventory is a full and true inventory of all the personal  
 or moveable estate or effects of the said deceased, wheresoever situated,  
 already recovered or known to be existing belonging or due to him  
 beneficially at the time of his death [and of all the money secured by  
 Scottish bonds or other instruments excluding executors, *if any*], with the  
 proceeds accrued thereon down to the date of death [*or, of the oath to said*  
*inventory*], in so far as the same has come to the deponent's knowledge :  
 That confirmation of the said personal estate is now required in favour  
 of the deponent, as executor-nominate under settlement [*describe it*],  
 [*or, as executor-dative qua* \_\_\_\_\_] decerned to the said deceased in  
 the Sheriff Court of Edinburgh on \_\_\_\_\_].—All which is  
 truth, as the deponent shall answer to God.

**70a. SUPPLEMENTARY INVENTORY, WITH NOTE OF TRUST FUNDS  
IN ENGLAND OR IRELAND : AND OATH THERETO.**

SUPPLEMENTARY INVENTORY of the Personal Estate, wheresoever  
 situated, of \_\_\_\_\_, who died at \_\_\_\_\_, on the  
 \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

Amount of the deceased's personal estate in Scotland given  
 up in the inventory thereof recorded in the Court Books  
 of the Commissariat of Edinburgh, on \_\_\_\_\_, £

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NOTE.—Funds in England held by the deceased in trust :  
 £100 stock of the Bank of England standing in name of the Trustees under ante-  
 nuptial contract of marriage between \_\_\_\_\_ and \_\_\_\_\_  
 dated \_\_\_\_\_ and of which trustees the deceased was the last survivor.

[NOTE.—*The funds specified in the foregoing note, not having belonged to the  
 deceased beneficially, are not liable in duty.*]

At \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, one thousand  
 nine hundred and \_\_\_\_\_  
 In presence of \_\_\_\_\_  
 Appeared \_\_\_\_\_, executor-nominate [or, dative] of the said  
 deceased \_\_\_\_\_, who being solemnly sworn and examined, depones,  
 —That the said deceased \_\_\_\_\_ died at \_\_\_\_\_ domiciled in Scot-  
 land, on \_\_\_\_\_ : That a full and complete inventory of the per-  
 sonal estate belonging or due beneficially to the said deceased \_\_\_\_\_,  
 with the proceeds accrued thereon to date of death (or to date of the oath  
 to said inventory), was exhibited and recorded in the Court Books of the  
 Commissariat of Edinburgh on \_\_\_\_\_, and that confirmation  
 of said personal estate in Scotland was expedite in favour of the deponent and  
 as executors nominated by the said deceased \_\_\_\_\_  
 in his settlement [*describe it*] dated \_\_\_\_\_, and recorded along  
 with said inventory in the Court Books of the Commissariat of Edin-  
 burgh, on \_\_\_\_\_ [or, as executor-dative *qua*  
 decerned to the said deceased \_\_\_\_\_, in the Sheriff Court of  
 Edinburgh, on \_\_\_\_\_] : That the deponent has not discovered  
 any other estate or effects belonging or due beneficially to the deceased :  
 But it has been ascertained that the deceased held in trust the funds in  
 England [or, Ireland] specified in the Note to the foregoing inventory,  
 and it is now required by the said executors that said Note be appended  
 to said confirmation in terms of section 43 of 39 & 40 Vict. c. 70.—All  
 which is truth, as the deponent shall answer to God.

#### FORM IN WHICH NOTE IS APPENDED.

The Note is appended by making an indorsation on the confirmation,  
 as follows :—

EDINBURGH, \_\_\_\_\_ 19 \_\_\_\_\_.—The following Note, set forth in  
 a supplementary inventory of the personal estate of the deceased \_\_\_\_\_  
 \_\_\_\_\_, recorded in the Court Books of the Commissariat of Edin-  
 burgh on [*date*], viz.—

[*Take in Note from Inventory.*]

Appended and signed by me in terms of the  
 Act 39 & 40 Vict. c. 70, sect. 43.

[*Signed by Commissary Clerk or his depute.*]

NOTE.—The deceased died  
 domiciled in Scotland.

[*Signed by Clerk.*]

NOTE.— *This Form is not available for Trust Funds in Scotland.*

**71. INVENTORIES AND OATHS IN APPLICATIONS FOR CONFIRMATION UNDER SMALL ESTATES ACTS, WHERE THE DECEASED DIED BEFORE 2ND AUGUST 1894.**

**(1.) IN APPLICATIONS FOR CONFIRMATION-DATIVE.**

(Act 44 Vict. c. 12, § 34.)

INVENTORY of the Personal Estate and Effects, wheresoever situated, of  
[*name and description of deceased*], who died at \_\_\_\_\_, on the  
day of \_\_\_\_\_ 18 \_\_\_\_\_.

SCOTLAND.

Cash in the house, . . . . .  
Household furniture and other effects in the deceased's  
house, . . . . .  
Stock in trade and other effects belonging to deceased, . . . .  
Sum in bank, viz.:—


[*Any other estate is added in the usual form.*]

At Edinburgh, the \_\_\_\_\_ day of \_\_\_\_\_, nineteen hundred and  
In presence of \_\_\_\_\_

Appeared [*name and description of applicant*], who being solemnly  
sworn and examined, depones,—That the said \_\_\_\_\_ died at  
upon the \_\_\_\_\_ day of \_\_\_\_\_, and had at the time of death  
his ordinary or principal domicile in \_\_\_\_\_ : That the deponent is  
the [widow, or son, or daughter; or brother and next of kin, the  
deceased having died without issue; or legatee of the said deceased,  
conform to last will dated \_\_\_\_\_, which, with a codicil thereto,  
dated \_\_\_\_\_, is herewith produced and signed as relative hereto;  
—*or other relationship or character in respect of which representation is  
applied for*], and is desirous to enter upon the possession and manage-  
ment of the deceased's estate as his executor: That the deponent does  
not know of any [*or, any other*] testamentary settlement or writing  
relative to the disposal of the deceased's personal estate or effects, or any  
part thereof: That the foregoing inventory, signed by the deponent and  
the said \_\_\_\_\_ as relative hereto, is a full and complete inventory  
of the personal estate and effects of the said deceased \_\_\_\_\_ where-  
soever situated, and belonging or due to him beneficially at the time of  
his death, in so far as the same has come to the deponent's knowledge:  
That the deceased had [*or, had no*] heritable estate in Scotland: That  
the value at this date of the said personal estate and effects, including  
the proceeds accrued thereon down to this date, does not exceed three  
hundred pounds sterling: That confirmation of the said personal estate  
in Scotland [England and Ireland, *as the case may be*] is required in  
favour of the deponent.—All which is truth, as the deponent shall  
answer to God.

## (2.) IN APPLICATIONS FOR CONFIRMATION-NOMINATE.

Act 44 Vict. c. 12, § 34.

INVENTORY of the Personal Estate and Effects, wheresoever situated, of  
 [name and description of deceased], who died Testate on the  
 day of , 18 , at .

## SCOTLAND.

Cash in the house, . . . . .	£	<table border="1"> <tr><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td></tr> </table>															
Household furniture and other effects in the house, . . . . .																	
Stock in trade and other effects belonging to deceased, . . . . .																	
Money in bank, viz, . . . . .																	
[Any other estate is added in the usual form.]																	

At Edinburgh, on the                      day of                      , nineteen  
 hundred and  
 In presence of

Appeared [name and description of applicant], who, being solemnly  
 sworn and examined, depones,—That the said                      died testate  
 on the                      day of                      at                      , and had at the time  
 of death his ordinary or principal domicile in                      : That  
 the deponent is executor-nominate of the said deceased [or general dis-  
 poncee, universal legatory, or residuary legatee, and as such executor-  
 nominate of the said deceased] (along with                      ) under his will [or other  
 testamentary settlement or writing], dated the                      day of                      , and  
 now exhibited and signed by the deponent and the said                      ,  
 as relative hereto: That the deponent has entered upon the possession  
 and management of the deceased's estate (along with the said                      ).  
 That the deponent does not know of any other will or testamentary  
 settlement or writing relative to the disposal of the deceased's personal  
 estate or effects, or any part thereof: That the foregoing inventory,  
 signed by the deponent and the said                      as relative hereto,  
 is a full and complete inventory of the personal estate and effects  
 of the said deceased wheresoever situated, and belonging or due to him  
 beneficially at the time of death, in so far as the same has come to the  
 knowledge of the deponent: That the deceased had [or, had no] herit-  
 able estate in Scotland: That the value at this date of the said personal  
 estate and effects, including the proceeds accrued thereon down to this date,  
 does not exceed three hundred pounds sterling: That confirmation of the  
 said personal estate and effects in Scotland [England, and Ireland, as the  
 case may be] is required in favour of the deponent [and the said  
 ].—All which is truth, as the deponent shall answer to God.

## 72. POWER OF ATTORNEY TO MAKE OATH, AND APPLY FOR CONFIRMATION.

### (1.) WHERE EXECUTOR ALREADY APPOINTED.

I, A. B., considering that I am the executor nominated by the deceased  
 , in his settlement [*describe it*], [*or* executor-dative  
 decerned to the deceased , by decree dated

], and that I am about to enter on the possession and management of the personal estate in Scotland of the said deceased, and it is necessary that I should exhibit and record in the proper Court in Scotland an inventory of said personal estate, but that, in consequence of my residence abroad, it would be inconvenient for me to do so personally, do therefore hereby authorise and empower as my attorney, to give up an inventory of the said personal estate, make oath thereto, and record the same in the books of said Court, and also to crave confirmation thereof in my favour as executor foresaid.—In witness whereof, I have signed these presents at , on the day of

Nineteen hundred and  
 [*Name and designation*], witness.

„ „ witness.

[Signed] A. B.

[*No stamp is required.*]

### (2.) WHERE EXECUTOR NOT YET APPOINTED.

I, A. B., considering that I am a son and one of the next of kin [*or as the case may be*] of the deceased , and that I am about to apply to be decerned and confirmed in Scotland as his executor-dative, —but that in consequence of my residence abroad it would be inconvenient for me to do so personally, Do therefore hereby authorise and empower as my attorney for me and in my name to present a petition in the proper Court, and obtain decerniture in my favour as executor foresaid, and thereafter to give up an inventory of the personal estate of the said , make oath thereto, and record the same in the Books of said Court, and also to crave confirmation thereof in my favour as executor foresaid.—In witness whereof, &c. (*as above*).

[*No stamp is required.*]

### (3.) INCLUDING POWERS TO UPLIFT AND DISCHARGE.

[*The following may be inserted in either of the two preceding forms immediately before the Testing Clause.*]

And I further authorise and empower the said for me, and in my name as executor foresaid, to uplift and receive, administer

and dispose of the personal estate and effects to which he may obtain confirmation in my favour as aforesaid, to grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that I as executor aforesaid could do if personally present. And I bind and oblige myself, and my heirs and successors, to ratify and confirm whatever the said \_\_\_\_\_ may do or cause to be done in virtue of the powers conferred upon him by these presents.—

*[If these clauses are added a stamp of 10s. will be required.]*

(4.) FOR RESEALING PROBATES, &c., UNDER COLONIAL PROBATES ACT.

I, A. B., considering that the deceased \_\_\_\_\_ died at \_\_\_\_\_ on the \_\_\_\_\_ leaving a last will and testament dated \_\_\_\_\_ in which he appointed me to be his executor and that Probate of the said last will and testament was [or, considering that the deceased \_\_\_\_\_ died at \_\_\_\_\_ on \_\_\_\_\_, and that letters of administration (or, letters of administration with the will annexed), were] granted in my favour by the Probate Court at \_\_\_\_\_ in the colony of \_\_\_\_\_ on \_\_\_\_\_, and that the said deceased left personal estate in Scotland to which I require to make up a title in the proper Court of that country in order to uplift and administer the same, and that in consequence of being resident abroad, it would be inconvenient for me to do so personally, do therefore hereby authorise and empower \_\_\_\_\_ as my attorney, to give up an inventory of the said personal estate in Scotland, make oath thereto, and exhibit the same in the Sheriff Court of the County of Edinburgh along with the said Probate [or, letters of administration; or, letters of administration with the will annexed], and to crave that the said Probate [or as the case may be] may be sealed with the seal of the Commissariat of Edinburgh, under and in terms of the Colonial Probates Act 1892: and thereafter to uplift, receive, administer, and dispose of the said personal estate in Scotland, to grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that I, as executor [or, administrator] aforesaid, could do if personally present: And I bind and oblige myself, my heirs and successors, to ratify and confirm whatever my said attorney may do or cause to be done in virtue of the powers conferred upon him by these presents.—In witness whereof (*as above*).

*[A Stamp of 10s. required.]*

## 73. BOND OF CAUTION FOR EXECUTOR-DATIVE.

I, \_\_\_\_\_, do hereby bind and oblige me, my heirs and successors, as cautioners and sureties acted in the Court Books of the Commissariat of Edinburgh, that the sum of [or, to the extent of \_\_\_\_\_ that the sum of] \_\_\_\_\_, contained in the testament-dative of umquhile \_\_\_\_\_, wherein is only executor-dative *qua* \_\_\_\_\_, decerned, and to be confirmed to him, shall be made free and furthcoming to all parties having interest therein as law will, the said executor being always bound for my relief as cautioner in the premises; and both parties subject themselves, their heirs, and successors to the jurisdiction of the Sheriff of the Lothians and Peebles in this particular, and appoint the Commissary Clerk's Office in Edinburgh as a domicile whereat they may be cited to all diets of Court, at the instance of all and sundry having interest therein as law will, holding any citation legally affixed, and left for us upon the walls of said office, as sufficient as if we were personally summoned.—In witness whereof, these presents are signed by me, at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, nineteen hundred and \_\_\_\_\_, before these witnesses, etc.

## ATTESTATION OF CAUTIONER.

I, \_\_\_\_\_, one of His Majesty's Justices of the Peace for the county of \_\_\_\_\_, do hereby certify that \_\_\_\_\_ is reputed a good and sufficient cautioner for the sum of \_\_\_\_\_, being the amount of the obligation undertaken by the \_\_\_\_\_ within bond of caution.

[Name]

[Place]

[Date]

## 74. BOND OF CAUTION UNDER SMALL ESTATES ACTS.

I, \_\_\_\_\_, do hereby bind and oblige me, my heirs and successors, as cautioners and sureties acted in the Court Books of the Commissariat of Edinburgh, that the sum of \_\_\_\_\_, contained in the confirmation-dative of umquhile \_\_\_\_\_, wherein is only executor-dative *qua* \_\_\_\_\_, to be decerned, and confirmed to him, shall be made free and furthcoming to all parties having interest therein as law will, the said executor being always bound for my relief as cautioner in the premises; and both parties subject themselves, their heirs, and successors to the jurisdiction

of the Sheriff of the Lothians and Peebles in this particular, and appoint the Commissary Clerk's Office in Edinburgh as a domicile whereat they may be cited to all diets of Court, at the instance of all and sundry having interest therein as law will, holding any citation legally affixed, and left for us upon the walls of said office, as sufficient as if we were personally summoned.—In witness whereof, these presents are signed by me, at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, nineteen hundred and \_\_\_\_\_, before these witnesses, etc.

#### ATTESTATION OF CAUTIONER.

I, \_\_\_\_\_, one of His Majesty's Justices of the Peace for the county of \_\_\_\_\_, do hereby certify that \_\_\_\_\_, designed in the foregoing bond, is reputed a good and sufficient cautioner for the amount of the obligation thereby undertaken.

[Name]

[Place]

[Date]

#### 75. CONFIRMATION—TESTAMENT-TESTAMENTAR.

THE TESTAMENT-TESTAMENTAR OF UMQUHILE D. [*design him*].

The said D. had pertaining and resting owing to him at the time of his decease—

[*Take in Inventory of the estate of which confirmation has been craved, but not estate abroad.*]

I, \_\_\_\_\_, Esquire, Sheriff of the Lothians and Peebles, considering that the said D. died at \_\_\_\_\_, upon \_\_\_\_\_, and that by his trust disposition and settlement [*or other writing or writings containing or affecting the nomination of executors*], dated \_\_\_\_\_, and recorded in the Courts Books of the Commissariat of Edinburgh upon \_\_\_\_\_, the said D. nominated and appointed A. and B.; C., in the event of his having attained the age of twenty-one years, which he has now attained; E., in the event of his being resident in this country, but who is now in India; F., who is now deceased; and G., who has declined to accept;—it being declared that the said A. shall be a *sine qua non*, and that the said B. shall be entitled to act only while she continues unmarried,—trustees under said trust disposition and settlement (and any other persons who might be assumed as such trustees), to be his executors. [*Where trustees have been assumed*, That the said A., B., and C., by deed of assumption, dated \_\_\_\_\_, and recorded in said Court Books on \_\_\_\_\_, assumed H. and I. to be trustees

under said trust disposition and settlement]. And that the said A., B., and C. [H. and I.], trustees, and as such executors foresaid, have given up on oath an inventory of the personal estate and effects of the said D. at the time of his death situated in Scotland [or, in Scotland and England, or, in Scotland and Ireland, or, Scotland, England, and Ireland, *as the case may be*], amounting in value to \_\_\_\_\_; which inventory as before written has likewise been recorded in said Court Books, of date \_\_\_\_\_: Therefore I, in His Majesty's name and authority ratify, approve, and confirm the nomination of executors contained in the foresaid trust disposition and settlement [and deed of assumption] [*or other writing or writings containing or affecting the nomination of executors*]. And I give and commit to the said A., B., and C. [H. and I.], subject to the conditions attached to the appointment of the said A. and B., as above set forth, full power to uplift, receive, administer, and dispose of the said personal estate and effects, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of an executor-nominate is known to belong: Providing always that they shall render just count and reckoning for their intrusions therewith when and where the same shall be legally required.

Given under the Seal of Office of the Commissariat of the County of  
Edinburgh, and signed by the Clerk of Court at Edinburgh,  
the \_\_\_\_\_ day of \_\_\_\_\_ nineteen hundred and \_\_\_\_\_  
*Commissary Clerk.*

*N.B.*—Where English or Irish estate is confirmed, append the following note :—"The deceased died domiciled in Scotland" [*signed by Clerk*].

Where confirmation issued under special authority, append the following note :—"Issued under special authority, conform to interlocutor of Sheriff-Substitute, dated \_\_\_\_\_" [*initialed by Clerk*].

## 76. CONFIRMATION—TESTAMENT-DATIVE.

THE TESTAMENT-DATIVE OF UMQUHILE D. [*design him*].

The said D. had pertaining and resting owing to him at the time of his decease—

[*Take in Inventory of the estate of which confirmation has been craved, but not estate abroad.*]

I, \_\_\_\_\_, Esquire, Sheriff of the Lothians and Peebles, considering that by my dercee dated \_\_\_\_\_, I decerned A., son and one of the next of kin of the deceased D., before designed [*or, legatee*

of the deceased D., before designed, conform to last will and testament produced; *or*, factor for B. and C., minor and pupil children of the deceased D., before designed, conform to appointment by the Sheriff-Substitute at Edinburgh, dated \_\_\_\_\_, *or other relationship or title founded on in the petition*], executor-dative *qua* next of kin [*or*, legatee, *or*, factor for minor and pupil next of kin, *or other character in which decerniture has been granted*] of the said D., who died at \_\_\_\_\_, on \_\_\_\_\_ : And seeing that the said A. has since given up, on oath, an inventory of the personal estate and effects of the said D., at the time of his death, situated in Scotland [*or*, in Scotland and England, *or*, in Scotland and Ireland, *or*, in Scotland, England, and Ireland, *as the case may be*], amounting in value to \_\_\_\_\_; which inventory, as before written, has been recorded in the Court Books of the Commissariat of Edinburgh, of date \_\_\_\_\_, and that he has likewise found caution for his acts and intromissions as executor: Therefore I, in His Majesty's name and authority, make, constitute, ordain and confirm the said A. executor-dative *qua* next of kin (*or otherwise as above*) to the defunct, with full power to him to uplift, receive, administer, and dispose of the said personal estate and effects, and grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of executor-dative *qua* next of kin [*or otherwise, as above*] is known to belong: Providing always that he shall render just count and reckoning for his intromissions therewith, when and where the same shall be legally required.

Given under the Seal of Office of the Commissariat of the County of \_\_\_\_\_  
Edinburgh, and signed by the Clerk of Court at Edinburgh,  
the \_\_\_\_\_ day of \_\_\_\_\_, nineteen hundred and \_\_\_\_\_.

*Commissary Clerk.*

*N.B.*—Where English or Irish estate is confirmed, append the following note:—"The deceased died domiciled in Scotland" [*signed by Clerk*].

## 77. CONFIRMATION—EIK TO TESTAMENT-TESTAMENTAR.

FIRST EIK TO THE TESTAMENT-TESTAMENTAR OF UMQUHILE D.  
[*design him*].

The said D. had pertaining and resting owing to him at the time of his decease—

[*Take in Inventory of the additional estate of which confirmation is craved, but not estate abroad.*]

I, \_\_\_\_\_, Esquire, Sheriff of the Lothians and Peebles, considering that the said D. died at \_\_\_\_\_, on \_\_\_\_\_, and that A., B., C., H., and I., as [accepting, *where any of the executors named had declined, or, surviving, where any of the executors named had died, or, accepting and surviving, as the case may be*], executors-nominate of the said D., under and in virtue of trust disposition and settlement, and deed of assumption [*or other writing or writings relating to or affecting the nomination of executors*], dated \_\_\_\_\_, and recorded in the Court Books of the Commissariat of Edinburgh on \_\_\_\_\_, gave up an inventory of his personal estate and effects on \_\_\_\_\_, and expedite a testament-testamentar upon \_\_\_\_\_: And seeing that the said A., being now deceased, and the said B., being now married, and therefore, in terms of her appointment, no longer entitled to act as executor, the said C., H., and I. have given up, on oath, an additional inventory of the personal estate and effects of the said D. at the time of his death, situated in Scotland [*or, in England, or, in Ireland, or in any two, or in all of these countries*], amounting in value to \_\_\_\_\_; which additional inventory, as before written, has been recorded in said Court Books, of date \_\_\_\_\_. Therefore I, in His Majesty's name and authority, of new ratify, approve, and confirm the nomination of executors contained in the foresaid trust disposition and settlement, and deed of assumption [*or other writing or writings relating to or affecting the nomination of executors*]: And I give and commit to the said C., H., and I. full power to uplift, receive, administer, and dispose of the said personal estate and effects contained in the foresaid additional inventory, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of an executor-nominate is known to belong: Providing always that they shall render just count and reckoning for their intromissions therewith, when and where the same shall be legally required.

Give under the Seal of Office of the Commissariat of the County of \_\_\_\_\_  
Edinburgh, and signed by the Clerk of Court at Edinburgh, the  
day of \_\_\_\_\_, nineteen hundred and \_\_\_\_\_.

\_\_\_\_\_  
Commissary Clerk.

*N.B.*—Where English or Irish estate is confirmed, append the following note:—"The deceased died domiciled in Scotland" [*signed by Clerk*]

## 78. CONFIRMATION—EIK TO TESTAMENT-DATIVE.

## FIRST EIK TO THE TESTAMENT-DATIVE OF UMQUHILE D.

[*design him*].

The said D. had pertaining and resting owing to him at the time of his decease—

[*Takes in Inventory of additional estate of which confirmation is craved, but not estate abroad.*]

I, \_\_\_\_\_, Esquire, Sheriff of the Lothians and Peebles, considering that by my decree, dated \_\_\_\_\_, I decerned A. [*as in the original confirmation*] executor-dative qua [*as in the original confirmation*] of the said D., who died at \_\_\_\_\_, on \_\_\_\_\_, and that the said A. gave up an inventory of the personal estate and effects of the said D. on \_\_\_\_\_, and expedé a testament-dative upon \_\_\_\_\_: And seeing that the said A. has now given up, on oath, an additional inventory of the personal estate and effects of the said D. at the time of his death, situated in Scotland [*or, in England, or, in Ireland, or in any two or in all of these countries*], amounting in value to \_\_\_\_\_, which additional inventory, as before written, has been recorded in the Court Books of the Commissariat of Edinburgh, of date \_\_\_\_\_, and that he has likewise found caution for his acts and intromissions as executor: Therefore I, in His Majesty's name and authority, of new make, constitute, ordain, and confirm the said A. executor-dative qua [*as in the original confirmation*] to the defunct, with full power to him to uplift, receive, administer, and dispose of the said personal estate and effects contained in the foresaid additional inventory, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of executor-dative qua [*as in the original confirmation*] is known to belong: Providing always that he shall render just count and reckoning for his intromissions therewith, when and where the same shall be legally required.

Given under the Seal of Office of the Commissariat of the County of  
Edinburgh, and signed by the Clerk of Court at Edinburgh, the  
day of \_\_\_\_\_ nineteen hundred and \_\_\_\_\_.

Commissary Clerk.

N.B.—Where English or Irish estate is confirmed, append the following note:—"The deceased died domiciled in Scotland" [*signed by Clerk*].

**79. CONFIRMATION—TESTAMENT-TESTAMENTAR *ad omissa (et male appretiata)*.**

THE TESTAMENT-TESTAMENTAR *ad omissa (et male appretiata)* OF UMQUHILE  
D. [*design him*].

The said D. had pertaining and resting owing to him at the time of his decease—

[*Take in from the Inventory the items of estate to be confirmed.*]

I, \_\_\_\_\_, Esquire, Sheriff of the Lothians and Peebles, considering that the said D. died at \_\_\_\_\_ upon \_\_\_\_\_, and that by his trust disposition and settlement [*or other writing or writings containing or affecting the nomination of executors*] dated \_\_\_\_\_, and recorded in the Court Books of the Commissariat of Edinburgh upon \_\_\_\_\_, the said D. nominated and appointed A. and B., whom failing C., to be his executors, and that the said A. and B. are both now deceased without having fully confirmed the personal estate of the deceased, and that C., substitute executor-nominate under the said trust-disposition and settlement [*or other title as the case may be*], has given up, on oath, an inventory of the personal estate and effects *ad omissa (et male appretiata)* of the said D. at the time of his death, situated in Scotland [*or, in England, or, in Ireland, or in any two, or in all of these countries*], amounting in value to \_\_\_\_\_, which inventory, as before written, has been recorded in said Court Books of date \_\_\_\_\_. Therefore I, in His Majesty's name and authority, ratify, approve, and confirm the nomination of the substitute executor contained in the foresaid trust-disposition and settlement [*or other writing or writings containing or affecting the nomination of executors*]: And I give and commit to the said C. full power to uplift, receive, administer, and dispose of the said personal estate and effects contained in the foresaid inventory *ad omissa (et male appretiata)*, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of an executor-nominate *ad omissa vel male appretiata* is known to belong: Providing always, that he shall render just count and reckoning for his intromissions therewith, when and where the same shall be legally required.

Given under the Seal of Office of the Commissariat of the County of  
Edinburgh, and signed by the Clerk of Court at Edinburgh, the  
day of \_\_\_\_\_ nineteen hundred and \_\_\_\_\_.

*Commissary Clerk.*

*N.B.*—If English or Irish estate is confirmed, append the following note:—"The deceased died domiciled in Scotland" [*signed by Clerk*].

# 80. CONFIRMATION—TESTAMENT-DATIVE *ad omissa (et male appretiata)*.

THE TESTAMENT-DATIVE *ad omissa (et male appretiata)* OF UMQUHILE D.  
[design him].

The said D. had pertaining and resting owing to him at the time of his decease—

[Take in from the Inventory the items of estate to be confirmed.]

I, \_\_\_\_\_, Esquire, Sheriff of the Lothians and Peebles, considering that by decree, dated \_\_\_\_\_, I decerned A., son and one of the next of kin of the deceased D., before designed [or, 'legatee of the deceased D., before designed, under his trust disposition and settlement produced, or other relationship or title founded on in the petition] executor-dative *ad omissa (et male appretiata)* qua next of kin [or legatee, or other character in which decerniture has been granted] of the said D., who died at \_\_\_\_\_ on \_\_\_\_\_: And seeing that the said A. has since given up, on oath, an inventory of the personal estate and effects *ad omissa (et male appretiata)* of the said D. at the time of his death, situated in Scotland [or, in England, or, in Ireland, or in any two, or in all of these countries], amounting in value to \_\_\_\_\_, which inventory, *ad omissa (et male appretiata)* as before written, has been recorded in the Court Books of the Commissariat of Edinburgh, of date \_\_\_\_\_, and that he has likewise found caution for his acts and intromissions as executor: Therefore I, in His Majesty's name and authority, make, constitute, ordain, and confirm the said A. executor-dative *ad omissa (et male appretiata)* qua next of kin [or otherwise, as above] to the defunct, with full power to him to uplift, receive, administer, and dispose of the said personal estate and effects contained in the foresaid inventory *ad omissa (et male appretiata)* and grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of executor-dative *ad omissa vel male appretiata* qua next of kin [or otherwise as above] is known to belong: Providing always, that he shall render just count and reckoning for his intromissions therewith, when and where the same shall be legally required.

Given under the Seal of Office of the Commissariat of the County of Edinburgh, and signed by the Clerk of Court at Edinburgh, the \_\_\_\_\_ day of \_\_\_\_\_ nineteen hundred and \_\_\_\_\_.

Commissary Clerk.

N.B.—If English or Irish estate is confirmed, append the following note:—"The deceased died domiciled in Scotland" [signed by Clerk].

81. CONFIRMATION—TESTAMENT-TESTAMENTAR *ad non executa*.THE TESTAMENT-TESTAMENTAR *ad non executa* OF UMQUHILE D.[*design him*].

The said D. had pertaining and resting owing to him at the time of his decease—

[*Take in the Inventory of estate to be confirmed.*]

I, \_\_\_\_\_, Esquire, Sheriff of the Lothians and Peebles, considering that the said D. died at \_\_\_\_\_ upon \_\_\_\_\_, and that by a trust disposition and settlement [*or other writing or writings containing or affecting the nomination of executors*] dated \_\_\_\_\_, and recorded in the Court Books of the Commissariat of Edinburgh upon \_\_\_\_\_, the said D. nominated and appointed A. and B., to be his executors, and that the said A. and B. gave up an inventory of the personal estate and effects of the said D. on \_\_\_\_\_, and expedite a testament-testamentar thereof in their favour on \_\_\_\_\_, but have both since died without having fully uplifted and transferred to the persons entitled thereto the estate confirmed by them: and that C., as substitute executor-nominate under the said trust-disposition and settlement [*or other title as the case may be*], has now given up on oath an inventory of said personal estate and effects *ad non executa* situated in Scotland [*or, in England, or, in Ireland, or in any two or in all of these countries*], amounting in value to \_\_\_\_\_, which inventory as before written, has been recorded in said Court Books of date \_\_\_\_\_: Therefore I, in His Majesty's name and authority, ratify approve, and confirm the nomination of the substitute executor contained in the foresaid trust disposition and settlement [*or other writing or writings containing or affecting the nomination of executors*]: and I give and commit to the said C. full power to uplift, receive, administer, and dispose of the said personal estate and effects contained in the foresaid inventory *ad non executa*, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of an executor-nominate *ad non executa* is known to belong: Providing always, that he shall render just count and reckoning for his intromissions therewith, when and where the same shall be legally required.

Given under the Seal of Office of the Commissariat of the County  
of Edinburgh, and signed by the Clerk of Court at Edinburgh,  
the \_\_\_\_\_ day of \_\_\_\_\_ nineteen hundred and \_\_\_\_\_

*Commissary Clerk.*

*N.B.*—If English or Irish estate is included, append the following note:—"The deceased died domiciled in Scotland" [*signed by Clerk*].

82. CONFIRMATION—TESTAMENT-DATIVE *ad non executa*.

THE TESTAMENT-DATIVE *ad non executa* OF UMQUHILE D. [*design him*].

The said D. had pertaining and resting owing to him at the time of his decease—

[*Take in the Inventory of estate to be confirmed.*]

I, \_\_\_\_\_, Esquire, Sheriff of the Lothians and Peebles, considering that the said D. died at \_\_\_\_\_, on \_\_\_\_\_, that A. and B. [*design them*] as executors-nominate of the said D. under his settlement [*describe it*], dated \_\_\_\_\_, and recorded in the Court Books of the Commissariat of Edinburgh, on \_\_\_\_\_ [or that A. and B. (*design them*), as executors-dative of the said D., decerned by me on (*date*)] gave up an inventory of his personal estate and effects on \_\_\_\_\_ and exped a confirmation thereof in their favour on \_\_\_\_\_, that the said A. and B. are both since dead without having fully uplifted and transferred to the persons entitled thereto the estate confirmed by them, and that by decree, dated \_\_\_\_\_, I decerned C. legatee of the deceased D., before designed, under his said settlement [*describe it*] produced [or next of kin, or other title or character founded on in the petition], executor-dative *ad non executa qua* legatee [or next of kin, or other title or character in which decerniture has been granted] of the said D.: And seeing that the said C. has since given up, on oath, an inventory of the said personal estate and effects *ad non executa* situated in Scotland [or, in England, or, in Ireland, or in any two or in all of these countries], amounting in value to \_\_\_\_\_, which inventory as before written, has been recorded in said Court Books, of date \_\_\_\_\_ and that he has likewise found caution for his acts and intromissions as executor: Therefore I, in His Majesty's name and authority, make, constitute, ordain, and confirm the said C. executor-dative *ad non executa qua* legatee [or otherwise, as above] to the defunct, with full power to him to uplift, receive, administer, and dispose of the said personal estate and effects contained in the foresaid inventory *ad non executa*, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of executor-dative *ad non executa qua* legatee [or otherwise, as above] is known to belong: Providing always, that he shall render just count and reckoning for his intromissions therewith, when and where the same shall be legally required.

Given under the Seal of Office of the Commissariat of the County  
of Edinburgh, and signed by the Clerk of Court at Edinburgh,  
the \_\_\_\_\_ day of \_\_\_\_\_ nineteen hundred and \_\_\_\_\_

Commissary Clerk.

N.B.—If English or Irish estate is confirmed, append the following note:—"The deceased died domiciled in Scotland" [*signed by Clerk*].

## 83. CONFIRMATION—CONFIRMATION-NOMINATE.

*Confirmation issued under the Act 57 & 58 Vict. c. 30, § 16.*

CONFIRMATION in favour of C. D., residing at \_\_\_\_\_, executor-nominate of A. B. [*design deceased*], who died testate on the day of \_\_\_\_\_, at \_\_\_\_\_, and had at the time of death his [*or, her*] ordinary or principal domicile in \_\_\_\_\_

The said deceased A. B. had pertaining and resting owing to him [*or, her*] at the time of his [*or, her*] death the following personal estate and effects, viz. :—

[*Take in particulars of estate as specified in the Inventory to be confirmed.*]

I, \_\_\_\_\_, Esquire, Sheriff of the Lothians and Peebles, considering that the said A. B. died testate, on the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_, and had at the time of death his [*or, her*] ordinary or principal domicile in \_\_\_\_\_ : And further, considering that the said A. B. by his [*or her*] will [*or other writing containing the nomination of executor*] dated the \_\_\_\_\_ day of \_\_\_\_\_, and recorded in the Court Books of the Commissariat of Edinburgh on \_\_\_\_\_, nominated and appointed the said C. D. to be his [*or, her*] executor [*or, appointed the said C. D. to be his general donee or universal legatory or residuary legatee, and as such his executor-nominate*], and now seeing that the said C. D., as executor-nominate foresaid, has given up, on oath, an inventory of the whole personal estate and effects of the said A. B. at the time of his [*or, her*] death, situated in Scotland [*and England, and Ireland, as the case may be*], amounting in value to \_\_\_\_\_ as therein and hereinbefore set forth, and that the said inventory has likewise been recorded in the said Court Books, on the said \_\_\_\_\_ day of \_\_\_\_\_ : Therefore I in His Majesty's name and authority, ratify, approve, and confirm the nomination of executor contained in the foresaid will [*or other writing containing the nomination of executor*] : And I give and commit to the said C. D. full power to uplift, receive, administer, and dispose of the said personal estate and effects, grant discharges thereof, if needful to pursue therefor, and generally everything concerning the same to do that to the office of an executor-nominate is known to belong : Providing always, that he shall render just count and reckoning for his intromissions therewith, when and where the same shall be legally required.

Given under the Seal of Office of the Commissariat of the County of Edinburgh, and signed by the clerk of Court at Edinburgh, the \_\_\_\_\_ day of \_\_\_\_\_, nineteen hundred and \_\_\_\_\_.

*Commissary Clerk.*

## 84. CONFIRMATION—CONFIRMATION-DATIVE.

*Confirmation issued under the Act 57 & 58 Vict. c. 30, § 16.*

CONFIRMATION-DATIVE of A. B. who resided at [*name and description of deceased*].

The said A. B. had pertaining and resting owing to him [*or, her*] at the time of his [*or, her*] decease—

[*Take in Inventory of estate to be confirmed.*]

I, \_\_\_\_\_, Esquire, Sheriff of the Lothians and Peebles, considering that the said A. B. died at \_\_\_\_\_, on \_\_\_\_\_, and had at the time of death his [*or, her*] ordinary or principal domicile in \_\_\_\_\_: and seeing that C. D., his [*widow, or son, or daughter, or her son or daughter; or, disponent or legatee conform to testamentary writing produced; or any other person entitled to representation other than as an executor-nominate*] has given up, on oath, an inventory of the personal estate and effects of the said A. B. at the time of death, situated in Scotland [England, and Ireland, *as the case may be*], amounting in value to \_\_\_\_\_, and has deponed that the gross value of the heritable and moveable property in respect of which estate duty is payable on the death of the deceased, exclusive of property settled otherwise than by the will of the deceased, does not exceed three [*or five*] hundred pounds, which inventory, as before written, has been recorded in the Court Books of the Commissariat of Edinburgh of date \_\_\_\_\_ and that \_\_\_\_\_ has likewise found caution for \_\_\_\_\_ acts and intromissions as executor: Therefore I, in His Majesty's name and authority, decern, make, constitute, ordain, and confirm the said C. D. executor-dative *qua* [*relict, next of kin, or other character in which confirmation may have been applied for*] to the deceased, with full power to \_\_\_\_\_ to uplift, receive, administer, and dispose of the said personal estate and effects, and grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of executor-dative *qua* \_\_\_\_\_ is known to belong: Providing always, that \_\_\_\_\_ shall render just count and reckoning for \_\_\_\_\_ intromissions therewith, when and where the same shall be legally required.

Given under the Seal of Office of the Commissariat of the County of \_\_\_\_\_  
Edinburgh, and signed by the Clerk of Court at Edinburgh,  
the \_\_\_\_\_ day of \_\_\_\_\_ nineteen hundred and \_\_\_\_\_

*Commissary Clerk.*

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